

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

IN RE:

KEITH JONSSON, an individual;  
MICHAEL JONSSON, an individual;  
CEDAR VALLEY FUR FARM,  
LLC, a Utah limited liability  
company,

Plaintiffs,

vs.

NATIONAL FEEDS, INC., an  
Ohio corporation,  
RANGEN, INC., an Idaho  
corporation,

Defendants.

Case 2:11CV140BSJ

BEFORE THE HONORABLE BRUCE S. JENKINS

JANUARY 17, 2014

REPORTER'S TRANSCRIPT OF PROCEEDINGS

JURY TRIAL

Reported by: KELLY BROWN, HICKEN CSR, RPR, RMR

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1 SALT LAKE CITY, UTAH, FRIDAY, JANUARY 17, 2014

2 \* \* \* \* \*

3 THE COURT: Good morning. Now how are we doing?  
4 It looks like we're all here. And bring in your jury.

5 (Whereupon, the jury returned to the  
6 court proceedings.)

7 THE COURT: And good morning again. Sit down and  
8 relax, folks. The record will show the jury is present.  
9 Counsel and the parties.

10 And you may proceed.

11 MR. MITCHELL: We call Jon Karraker, Your Honor.

12 THE COURT: Okay. Sir, if you'll come forward and  
13 be sworn, please.

14 THE CLERK: Raise your right hand.

15 JON KARRAKER,  
16 called as a witness at the request of Defendant,  
17 having been first duly sworn, was examined  
18 and testified as follows:

19 THE WITNESS: I do.

20 THE CLERK: Okay. Have a seat right over here,  
21 please.

22 And can you state your name when you get seated and  
23 spell it for the record, please.

24 THE WITNESS: Jon Karraker. J-O-N, Karraker,  
25 K-A-R-R-A-K-E-R.

DIRECT EXAMINATION

BY MR. MITCHELL:

Q. Mr. Karraker, would you tell us a little bit about your educational background, please?

A. I grew up in Arvada, Colorado. I went to public school out there. My parents moved back East. I ended up doing my undergrad to Rutgers' back in New Jersey. I taught school for three years. I was a history major. Taught school for three years, Fifth and Sixth Graders outside Washington, DC. Went back and got an MDA at Dartmouth College, also back East, in accounting and finance, and started with the Big Four accounting firms. Worked with PriceWaterhouseCoopers. I was director of their litigation group. I have been independent for 30 years. I do strictly litigation consulting, expert testimony, any kind --

Q. Are you a member of any associations?

A. Sorry?

Q. Are you a member of any associations?

A. Sure. American Institute of CPAs, Colorado Society of CPAs.

Q. And do you have any licensure as a CPA?

A. Yes. I'm a licensed CPA.

Q. In what states?

A. Colorado.

Q. And I believe you started touching on your work

1 experience. Can you elaborate on that just a little bit?

2 THE COURT: I'm having trouble picking you up, so  
3 make sure you use the mike. Is the green light on?

4 MR. MITCHELL: You know, I had never noticed that  
5 green light this whole time. Is that better?

6 THE COURT: Yes.

7 MR. MITCHELL: Okay.

8 THE WITNESS: Mine's echoing, so I don't know if  
9 you're hearing it echo or not.

10 Anyway, I do strictly litigation. I work -- I  
11 testify about 40 percent of the time for plaintiffs, about  
12 60 percent of the time for defense. In terms of the amount of  
13 work that I do, about 80 percent of it is defense. It's any  
14 kind of business valuation, lost profits, any kind of  
15 accounting matter.

16 Let's see. As a CPA, my job is to be independent,  
17 objective and skeptical with an emphasis on skeptical. So  
18 we're going to talk about some numbers today.

19 Q. And have you agreed to do the work in this case for  
20 free?

21 A. Oh, I'm \$250 an hour. And I've spent lots of  
22 hours. I've been very thorough on this.

23 Q. Okay. What were you asked to do in this case?

24 A. I was asked to look at it and see if there were  
25 damages.

1 Q. And if you found there were damages?

2 A. Oh, I've done about 10 different analyses that we  
3 will talked about. And in my opinion, there are no damages  
4 here, period.

5 Q. What materials did you consider in reaching that  
6 opinion?

7 A. A full banker's box worth starting with tax  
8 returns, looking at profits, looking at sales revenues,  
9 looking at the actual sales of mink, looking at the production  
10 numbers, pricing, anything to do with costs, anything to do  
11 with the breeders. This means looking at a lot of auction  
12 records. ALC, if you've heard that term; NAFA, North American  
13 Fur Auctions; also looking at the live sales. So any kind of  
14 financial and production information I could get my hands on.

15 Q. And what was the significance of those materials?  
16 What kind of information did they contain that was important  
17 in your work in this case?

18 A. Well, as an example, in looking at profits, I  
19 looked at the profits of the company both before and after the  
20 alleged incident. I looked at the sales revenues both before  
21 and after the alleged incident. I looked at the production.  
22 I'm going to throw out the term pelts to market per female  
23 breeder. I looked at that both before and after. I looked at  
24 the various live sales. Looked at breeder purchases. Looked  
25 at Dr. Roberts' report and Mr. Hoffman's report. Read the

1 depositions of the Jonssons. Essentially everything.

2 Q. And once you made it through that mountain of  
3 information, did you perform any analyses?

4 A. Oh, sure. And the analyses are what we'll talk  
5 about today. There are about 10 analyses that we'll try to  
6 run through quickly. Three of them are very important for you  
7 guys to make decisions on.

8 Q. Why don't you go ahead and list the analyses and  
9 talk about just a little bit. Identify what they are, and  
10 then we'll spend a little time talking about the analyses that  
11 you've done and how you did them.

12 A. Okay. Well, the first area to look at is net  
13 profits. And net profits actually increased after the alleged  
14 incident. And I'll write these numbers on the board later.  
15 But in the two years prior, the company lost a lot of money in  
16 one year, 200-some-thousand, and then made 60,000. And then  
17 the two years after they made over 100,000 in each year. So  
18 we'll talk about profits both before and after.

19 Q. And what's the next thing that we'll talk about?

20 A. Next thing is going to be sales revenues. And I'm  
21 going to say, here's what the sales revenues were before,  
22 here's what the sales revenues were after.

23 Q. And have you also looked just at the historic sales  
24 to the sales after the alleged incident?

25 A. Yes.



1 Q. And what are we going to talk about there?

2 A. Just that. What it was. And they increased, the  
3 sales increased afterward.

4 Q. What other analyses are we going to look at?

5 A. With respect -- Can I just go to the board and  
6 start writing numbers?

7 Q. Yeah. Should we start back at number one?

8 A. How does this -- how does this work?

9 Can you all hear me? I'll try not to turn my back  
10 to you.

11 The first thing to look at is profit. Okay, this  
12 is net profit. And the summary number in 2009, the company  
13 reported a loss of \$330,000. In 2010, the company had 67,701.  
14 And we'll talk later. A lot of that has to do with pricing.  
15 When mink pricing went up, they make profit. Mink prices were  
16 down in 2009 and back up in 2010.

17 And in the two years post incident, the company had  
18 \$124,734. This includes various categories. It includes  
19 capital gains on sale of minks. But the total amount is 124.  
20 In 2012, the total amount is 231,829.

21 So the very first thing that I looked at is, what's  
22 going on with profit? And the answer is, in the two years  
23 before the company lost money in one year, made a little bit  
24 of money the next year. And then in the two supposedly lost  
25 years, the actual profit went up.

1 Q. And what were the sources of your information for  
2 the numbers that we've got up on the board here?

3 A. Tax returns.

4 Q. And what were you looking at when you -- what  
5 information within those, within the tax returns were you  
6 looking at to find those numbers?

7 A. Two components. One of them is the profits  
8 reported, and the other one is called long-term capital gains,  
9 mink sales.

10 Q. And why is that we're only looking at the two years  
11 before this incident?

12 A. That's all I had.

13 Ready for next?

14 Q. Yeah.

15 A. So should I erase it? Is that the way it's going  
16 to work?

17 Q. Yes. If they're going to be numbers that you're  
18 going to need to use later on, we have the backs of some of  
19 these displays over here to write on.

20 A. No. I'm fine. And I apologize. I have a Denver  
21 cold. I'll try not to breathe on you guys.

22 Okay. So the first thing that any accountant looks  
23 at is profit because obviously it's most important. The  
24 second thing that you look at is sales revenues because often  
25 times there's a lot going on that you see in sales revenues

1 that you don't see if you just look at profits. So the next  
2 area is same thing. What are the sales revenues before, and  
3 what are the sales revenue after?

4 Q. What were you looking at to find the sales revenue  
5 information?

6 A. The sales revenue information comes from a  
7 combination of the tax returns, the ALC information and also  
8 live sales. And what I did is I added all of those together.

9 Q. And what did you find that was of any significance?

10 A. Well, the first thing that is significant here is  
11 that before it was 1.6 million in 2008. In 2009, 995,000. In  
12 2010, 1,733,000. And then the sales revenues after are 2490,  
13 2872 and 3389. So what you can see here clearly is that just  
14 in total sales revenues which includes the number of mink they  
15 sold or pelts they sold and the price, it went up dramatically  
16 after the loss period, okay?

17 Now, what I looked at next, and I'm going to go  
18 back to the previous numbers. And this time I'm going to show  
19 you -- you've now seen the net profits, and you've seen the  
20 sales revenues. And I'm going to add onto that what  
21 plaintiffs are asking for in damages. So we're back to the  
22 profit page where they actually made 124 and 231. The amount  
23 of losses that plaintiffs are asking for through the last  
24 report that I saw of Dr. Roberts, Dr. Roberts is asking for  
25 \$3.9 million in losses. And so rather than making \$124,000 in

1 2011, Dr. Roberts is saying they need to be compensated an  
2 additional \$1.1 million for that year. Rather than making  
3 231,000, he's got another \$900,000 in compensation. In 2013,  
4 1.1. So on top of the money that they were already making,  
5 Dr. Roberts is asking for \$3.9 million more.

6 There are two components of that. The two  
7 components of it in terms of quantity, what he called quantity  
8 losses, loss in pelts, 1.3. Loss in price, 0.5. And then 2.0  
9 to spent on more breeder mink.

10 Q. When you say 1.3, 2.0, are we talking millions?

11 A. Millions. Right. And so as compared to making  
12 124,000 and 231,000, which they actually made, Dr. Roberts is  
13 saying to compensate these folks, we have to give them another  
14 \$3.9 million. He wants to give them 1.1 million total in  
15 2011; 900,000, 1.1 million and 800,000. So he's saying they  
16 would have achieved not just what they did, but they would  
17 have achieved this entire additional amount in two components.  
18 They would have made 1.8 million more profit, and they need to  
19 spend \$2 million on replacing breeder mink. And so that's  
20 what this case is all about. And obviously I just don't find  
21 any of these numbers that Dr. Roberts has reasonable at all.  
22 They're way out of line with any kind of profits that the  
23 company has made.

24 Shall I go on?

25 Q. Yeah.

1           A.    Let's go back to the sales. And it's important to  
2   look at the profits and sales. I'll go back and forth a  
3   little bit. And so what we have in sales is the actual sales  
4   went up a lot. And so what you see here is the sales were  
5   1.7 million. And the way that it works, again, to be basic, I  
6   know I'm a Sixth Grade teacher, you take sales, then you have  
7   expenses and then you have profits, okay? So we're just  
8   dealing with the sales part here, and you saw the profits. So  
9   the sales go from 1.7 to 1.4 to 2.8 to 3.4, okay?

10           So after Dr. Roberts is talking about is in total  
11   is he says they would have made an additional \$2.2 million of  
12   sales in those years. And again, given they were doing so  
13   much better it's unreasonable to think they would have been  
14   doing this much better. That's another issue that you'll have  
15   to deal with.

16           Q.    Do the plaintiffs have any history of performing at  
17   the levels that Dr. Roberts suggests they would have  
18   performed?

19           A.    No. But we really haven't talked about that yet,  
20   so let's talk about it next.

21           The next thing to look at is instead of the sales  
22   revenues we need to just look at the total number of sales.  
23   Total number of sales is two things. It's pelts to market,  
24   which actually go to auction; and it's live sales, where  
25   they're selling breeders to other individuals. The total

1 sales numbers are 29,000, 25,000 and 30,000. And the actual  
2 sales numbers including live sales afterward are 36, 34 and  
3 43. So you can see that the actual sales, the actual pelts to  
4 market and live sales increase substantially after the alleged  
5 loss period.

6 What plaintiff wants to do here is to add an  
7 additional --

8 THE COURT: I think you need to proceed by question  
9 and answer, counselor --

10 MR. MITCHELL: Certainly, sir.

11 THE COURT: -- rather than a narrative. Let's put  
12 your question and let's get a response.

13 THE WITNESS: All right.

14 MR. MITCHELL: Certainly.

15 Q. BY MR. MITCHELL: So we're looking at the  
16 historical pelts and actually really animals to sale in one  
17 form or another. And how do -- what is it that is of  
18 significance when we compare the historical performance to the  
19 post-incident performance that you find of significance in  
20 those numbers?

21 A. What is significant is that after the alleged loss  
22 period, in fact, the number of pelts to market and the number  
23 of live sales actually increase significantly. This isn't  
24 price. This is just units. So it goes up 20 percent. And  
25 then here it's up a full 30 percent. It's up tremendously.

1 That's the first thing that's important.

2 Q. And as we're looking at the comparison of  
3 historical animals to market versus the post-incident animals  
4 to market, are we looking at any factors in addition to simply  
5 the total number of sales that occurred? So, for example,  
6 maybe the herd size changes?

7 A. Oh, sure. We haven't gotten to there yet. But  
8 when you have more breeders, you're to have more. We'll get  
9 to that next. But the next thing to look at is what --

10 THE COURT: It might be well if you answered the  
11 question that counsel put. You say you're going to get to it.  
12 Why don't you respond to the question that he just put?

13 THE WITNESS: Sorry. What did I do wrong?

14 Q. BY MR. MITCHELL: That's okay. The question is,  
15 and just provide a brief synopsis of it, we'll go into it a  
16 little more detail later. But when we're looking at the  
17 comparison of historical performance before the incident and  
18 the performance after the incident, how did you take into  
19 account any changes in herd sizes that might account for some  
20 of those variations that you see?

21 A. That's the next analysis that I'm going to do. We  
22 have to look at the actual sales and also the number of  
23 breeders and divide sales by breeders, which do you want me to  
24 do that now?

25 Q. Well, was there anything else of significance that

1 we see that we can find in the historical numbers versus the  
2 post-incident numbers?

3 A. Well, yes. And that's what plaintiff is projected.

4 Q. Okay. So what is it that plaintiff has projected  
5 that you find of significance?

6 A. Plaintiff has projected that the sales in this year  
7 would have been 40 and this year would have been 46 and in  
8 this year would have been 49. You can see it's a full 12,000  
9 in this one year. So plaintiff is projecting that the sales  
10 would have been much greater.

11 Q. And why is that of significance?

12 A. Well, because we have to determine whether or not  
13 that's a reasonable assumption.

14 Q. And did you go about and perform that analysis?

15 A. Yes.

16 Q. And how did you do that?

17 A. Well, what I looked at next was both the sales and  
18 the breeders. So if you take the total sales and divide it by  
19 the total number of breeders, these are both blacks and  
20 mahoganies, the total sales per female breeder were 3.9 in  
21 2008. It was 3.37 in 2009. It was 3.93 in 2010. And then  
22 after the alleged incident, 4.6, 4.4 and 4.9.

23 Q. What is the significance of those numbers?

24 A. It means that the increase in both sales, revenues  
25 and total sales was not due just to adding an awful lot of



1 breeders. It was that the actual production results in terms  
2 of pelts to market plus live sales divided by female breeders,  
3 those numbers went up. In other words, they actually  
4 performed better. A lot better. This is total. And you can  
5 break it down black and mahogany, and you get the same  
6 results.

7 Q. Okay. And is there anything else of significance  
8 that we can see from those numbers?

9 A. Yes. Next what plaintiff projected for blacks is  
10 3.57 and for mahoganies is 5.50 going forward for all those  
11 years.

12 Q. And why is that of significance?

13 A. Well, because we're going to compare what actually  
14 happened to plaintiff's projection, and we're going to compare  
15 the historical results before to what plaintiff has projected.  
16 And so if you do a weighted average, plaintiff looked at this  
17 3.9 number and the 3.37 number and the 3.93 number, which are  
18 historically 4.1, 3.1 and 4.0.

19 Q. Now, when you said you need to look at a weighted  
20 average, what did you mean?

21 A. There were more mahogany than blacks, so you look  
22 at a total average. So the actual numbers were 3.9, 3.4, 3.9,  
23 both black and mahogany. And then it became 4.6, 4.4, and 4.9  
24 afterward, so they did better afterward. Plaintiffs is  
25 projecting that the blacks would have upon 3.57 and the

1 mahoganies would have been 5.50. So the weighted number is  
2 4.6. So you can see that the actual numbers are even higher  
3 than what plaintiffs are projecting here. Much higher than  
4 they did historically.

5 Q. Is there anything else within this analysis that is  
6 of any significance to you?

7 A. No. I think that's it for that one.

8 Q. So what is the next analysis that you performed?

9 A. Well, so what we've done so far is we've looked at  
10 profit, we've looked at sales revenues, we've looked at sales,  
11 and we've looked at productivity, which is the production per  
12 each breeder. The next issue to look at is the actual live  
13 sales, which are breeders sold versus the number per plaintiff  
14 that Dr. Roberts says they still need to purchase to make the  
15 herd whole.

16 Now, what we have here is the live sales, and these  
17 are per documents that plaintiff had. Live sales were 7,700  
18 in 2011; were 3,000 in '12; and were 1,000 in 2013. So the  
19 farm actually sold 11,700 live sales to be used by breeders by  
20 other farmers.

21 So while they selling 11,700, Dr. Roberts says they  
22 need to or should have purchased or should still purchase a  
23 total of 4,000, 2000 in that first year. And this is a clear  
24 inconsistency, given that they were making live sales, why did  
25 they need to purchase more breeders? The live sales are

1 breeders. And so this analysis just doesn't fit. If you want  
2 to increase your herd, you can do it by not making these live  
3 sales and adding to your breeders.

4 I'm sorry. Shall I keep talking, or do you want to  
5 ask another question?

6 THE COURT: Is there another question?

7 MR. MITCHELL: Yeah.

8 Q. BY MR. MITCHELL: Was there anything else of  
9 significance in terms of the breeders that you looked at?

10 A. Live sales breeders the best of the crop were  
11 selling for about \$100. Dr. Roberts computed the costs of  
12 these 4,000 at \$500 per and in some cases higher. And this is  
13 how he got to a \$2 million loss. And I look at it and say  
14 they have no need to purchase any of these other breeders,  
15 much less at \$500 when they were selling 11,000 at \$100.

16 Q. Mr. Karraker, have you ever seen a record of the  
17 plaintiffs ever having sold a breeder mink for \$500?

18 A. No. What we saw is they sold these 1,000 for 110.

19 Q. Is that the highest figure that you've seen the  
20 plaintiffs sell a breeder mink for?

21 A. Yes. And the price at market in earlier years was  
22 about 80 or something. But I have not seen how much they sold  
23 these others for.

24 Q. Okay. So is there anything else that we ought to  
25 look at of significance with regard to the breeders?

1           A.     No.

2           Q.     Okay. And so what's the next analysis that you  
3 performed?

4           A.     I'm not going to write it on the board. It's  
5 prices. And the question is, did prices go down?

6           THE COURT: The question was, what next analysis  
7 did you perform?

8           THE WITNESS: I'm sorry.

9           THE COURT: And you can answer that generally.

10          THE WITNESS: All right. The next analysis that I  
11 performed was look at prices.

12          Q.     BY MR. MITCHELL: And what did you find of  
13 significance in that analysis?

14          A.     Let's just look at one year, which is 2011.

15          Q.     Why are we only going to look at one year?

16          A.     Because it will make the point.

17                 This is mahogany. They actually sold their  
18 mahogany at \$73 at auction, and the market average was 77.  
19 And so it's a little bit less, okay? Historically they had  
20 done about the same in terms of they would have made this 77  
21 or a little bit higher. And then in 2011 and 2012, they were  
22 about the same or a little bit less.

23                 And so the question is, did price go down? And the  
24 answer is -- and I'm sorry for saying the question, Judge.  
25 It's a bad habit. So the issue here is there were live sales.

1 And the live sales were 100, and this would take up this whole  
2 average. And so it looks to me like they were getting as much  
3 in prices after the incident as they were before.

4 Q. What do you mean they were getting as much in  
5 prices after the incident as they were before? I didn't  
6 understand that.

7 A. Okay. Before the incident, they were a little bit  
8 above market, a little bit above the 77. After the incident  
9 in mahogany they were down to 73.

10 Q. Is that just at auction that you're talking about?

11 A. Yes.

12 Q. Okay.

13 A. And if we add in live sales at 100, it's about the  
14 same. So I cannot see a price loss.

15 Q. Okay. And was there anything else about pricing  
16 that was of significance to you?

17 A. No. That's it for prices.

18 Q. Okay. So what's the next analysis that you looked  
19 at?

20 A. Cost.

21 Q. And what did you find of significance in cost?

22 A. Dr. Roberts in doing his analysis said that, okay,  
23 we have this much in terms of revenue losses. We have to  
24 subtract out the costs of raising the additional mink that he  
25 says they've lost. And he did that at \$19 per mink. And

1 historically, the company was running at \$40. In other words,  
2 if they sell it for 90, any losses they had were actually at  
3 \$50 a mink. And Dr. Roberts computed it at 71. So I disagree  
4 with what he did there, also.

5 Q. Okay. What information were you looking at when  
6 you calculated their actual cost to raise a mink?

7 A. This is feed. It's labor. It's all the direct  
8 costs of raising one more mink. If there is a dead mink, if  
9 it had lived, he would have had to feed it. You would have to  
10 have people working on it for labor. So these are all the  
11 specifically related costs to raise one more mink. This is  
12 also an industry number.

13 Q. And where did that information come from?

14 A. This came directly from the tax returns.

15 Q. Is there anything else related to costs that you  
16 found of significance?

17 A. Those are the main areas. There are other issues  
18 about depreciation.

19 Q. What did you find of significance about  
20 depreciation?

21 A. Depreciation in 2011 and 2012, we're back to the  
22 amount of profit they made, 124 in 231. Depreciate in those  
23 years were 553,000 and 337,000. Depreciate in the previous  
24 year was 77. So a tremendous amount of money. Depreciation  
25 is essentially you spend money. You have to capitalize it.

1 You can't expense it all in one year. You have to depreciate  
2 it. It is essentially reinvestment in the business, okay?

3 So what happened in these two years afterward, not  
4 only were they making a really good profit, but they had the  
5 money to invest 553 and 337 more in improvements to the farms,  
6 improvements to the assets. And so if you particularly say,  
7 if you include all of the reinvestments in the business they  
8 were doing great in the two years after the alleged incident.

9 Q. Anything else of significance from those numbers  
10 that you found?

11 A. No. Just I guess the summary.

12 Q. Were there any other analyses that you performed?

13 A. Sure. I performed an additional 10 analyses, but  
14 they're not significant. There are just really three  
15 significant things for you guys.

16 Q. Okay. So you've indicated earlier that you  
17 reached, that it's your opinion in this case that the  
18 plaintiffs have not suffered any losses following the feeding  
19 of the crumlets?

20 A. Sure. It's zero losses based on what we've talked  
21 about.

22 Q. Okay. So would you just list out the reasons why  
23 you reached that conclusions?

24 THE COURT: Can he resume the witness chair?

25 MR. MITCHELL: Is it okay if he lists them on the

1 board?

2 THE COURT: I'm happy to have him do that. That's  
3 fine.

4 MR. MITCHELL: I'd prefer it if he just --

5 THE COURT: He's already gone through them, though.

6 MR. MITCHELL: Yeah. We're just doing a quick  
7 summary of them.

8 THE WITNESS: Just the key issues that you guys are  
9 going to have to decide.

10 THE COURT: I thought you were going to list the  
11 material. Why don't you list them?

12 THE WITNESS: Okay. First one is productivity.  
13 And before, productivity is less than after. This is kits.  
14 This is pelts per market plus live sales. Productivity, they  
15 did better afterward.

16 The second key area is breeders. They sold 11,000.  
17 Why would they need to purchase 4,000?

18 And the third issue is essentially profits,  
19 particularly with live sales and depreciation. They're doing  
20 much better before than after.

21 Q. BY MR. MITCHELL: Okay. Why don't you go ahead and  
22 take a seat.

23 Mr. Karraker, what was the third thing that you  
24 just listed for us? Was it profits?

25 A. Sure, profits. They're doing much better after the



1       alleged incident than they were before.

2               Q.     Okay. I thought I had misheard you, that you said  
3       they were doing better before than after, so I wanted to get  
4       that clarified.

5               So to a reasonable degree of accounting certainty,  
6       what is your opinion in this case?

7               A.     There are no losses.

8               Q.     And your opinion is the information, materials and  
9       data that your opinion is based on is the type of information,  
10      materials and data that accountants reasonably rely upon in  
11      forming their opinions?

12              A.     Yes. The 10 analyses that we've gone through.

13              Q.     Thank you.

14              I have no further questions.

15                               CROSS-EXAMINATION

16       BY MR. HANCEY:

17              Q.     Mr. Karraker, good morning.

18              Are you a practicing accountant?

19              A.     I'm a CPA, yes.

20              Q.     Do you do any tax work?

21              A.     No.

22              Q.     You're a professional expert witness; correct?

23              A.     Yes.

24              Q.     And you have been for 30 years; right?

25              A.     Yes.

1 Q. Do you hold any degrees in economics?

2 A. No.

3 Q. How about statistics?

4 A. No.

5 Q. You have an accounting degree; correct?

6 A. No. I have an MBA.

7 Q. MBA in accounting; right?

8 A. No. I have an MBA. It's a general MBA. I took  
9 accounting --

10 Q. And a bachelor's in accounting?

11 A. No. I have a bachelor's in history.

12 Q. Oh, in history. Excuse me for that. Yes, that's  
13 right.

14 One of the analyses that you just got done talking  
15 about had to do with the Jonssons' profits; right?

16 A. Yes.

17 Q. Isn't it true that if the Jonssons in 2009 spent a  
18 lot of money to build four new mink sheds for their operation  
19 to house additional breeders, that would have an impact on  
20 their profits; right?

21 A. Yes.

22 Q. And after the 2010 feeding of the crumlets, if the  
23 Jonssons had breeder mink that they otherwise would have  
24 wanted to keep to produce kits over the next three years but  
25 instead because of low production they sold those breeders at

1 the market because they were detrimental to their operation,  
2 that would artificially inflate their sales revenue for that  
3 year, wouldn't it?

4 A. If I follow that question correctly, yes.

5 Q. And it would also artificially inflate their sales  
6 for that year, wouldn't it?

7 A. Yes.

8 Q. You would agree with me, wouldn't you, sir, that a  
9 damages calculation is more than just looking at lost profits  
10 in certain situations? Right?

11 A. Oh, sure. Like the 10 analyses we did today.

12 Q. You have to look at the whole picture, don't you?

13 A. Yes.

14 Q. If the Jonssons had a history, for example, of  
15 achieving annual growth of their mink herd of 8 percent a  
16 year over a 10-year period of time and they were unable to  
17 achieve that same growth rate because of something like the  
18 crumlets, that would be a loss, wouldn't it?

19 A. No. What we have here is we have the sale of the  
20 11,000 live sales. They could have kept those and increased  
21 the herd.

22 Q. So are you saying that if I'm a car dealer and my  
23 inventory of Hondas is wiped out, I shouldn't sell any more  
24 Toyotas?

25 A. No. What I'm saying is if they increased the herd

1 by 8 percent per year, if they had kept those 11,000 live  
2 sales they could have increased the herd even farther than  
3 they did.

4 Q. Mr. Karraker, you're aware that all of the live  
5 sales that the Jonssons achieved after 2010 were sales of  
6 mahogany animals; correct?

7 A. I've been told that. I've never seen a document of  
8 that.

9 Q. And you have no reason to dispute that, do you?

10 A. No.

11 Q. Okay. And you're also aware that the Jonssons  
12 wanted to increase the black breeder portion of their herd;  
13 right?

14 A. No, I'm not. There's a memo in there saying that  
15 the mahoganies have better production and their prices were  
16 getting closer to blacks. One of the Jonssons said,  
17 therefore, it makes a lot of sense to move to mahoganies from  
18 blacks, which also happened in Utah. That was the trend.

19 Q. If the Jonssons wanted to replace the black  
20 breeders that they lost in 2010, that has no bearing on  
21 whether or not they sell mahogany animals, does it?

22 A. Not quite. Your point is could there be a loss in  
23 blacks, and the answer is possible. But they chose to  
24 increase the mahoganies instead of blacks. If they could have  
25 kept the mahoganies up and had the blacks up, that's a

1 possibility.

2 Q. Mr. Karraker, if what I said is true, that they  
3 wanted to increase their black herd and sold mahogany animals  
4 in the meantime, that's no different than the car dealer who  
5 lost all of his Hondas but still wants to sell Toyotas; right?

6 A. No. If they had wanted to increase the black herd,  
7 they should have gone out and bought more black breeders and  
8 made those sales. And then we would be talking about a real  
9 out-of-pocket loss. That didn't happen. What happened was  
10 they increased their mahoganies tremendously.

11 Q. Do you know whether or not black breeders were  
12 readily available after their losses?

13 A. I do not. I do not.

14 Q. And if I told you that Patrick Fur Farms, which is  
15 the source for comparable black breeders, couldn't produce  
16 them on such short notice, you have no reason to dispute that,  
17 do you?

18 A. I do.

19 Q. You don't know one way or another?

20 A. No, I do know. Patrick Fur Farm is not comparable.  
21 They're 250 to \$500 an hour. They're the Cadillac in the  
22 industry. They are not at all comparable to these, which are  
23 \$100 an hour breeders. So Patrick Fur Farm is not comparable  
24 at all. Your question is, were there blacks out there that  
25 they could have purchased? I don't know. They did increase

1 the mahogany such that the mahogany made up for any potential  
2 losses, if any, in black. Could they have done more blacks?  
3 I don't know.

4 Q. Well, the Jonssons started their black breeder herd  
5 by purchasing from the Cadillac in the industry, Patrick Fur  
6 Farms; right?

7 A. I don't know.

8 Q. More than 10 years ago?

9 A. I don't know.

10 Q. And if they did and if they continued to from that  
11 point on grow their black herd from within, not by bringing in  
12 outside breeders, by taking those Patrick Fur Farm breeders  
13 and have them interbreed every year, picking out the best ones  
14 every year, then they had Patrick Fur Farm quality black  
15 breeders, didn't they?

16 A. No. Their blacks were also selling at a lower  
17 amount. No. Your point is the blacks did go down.  
18 Mahoganies went up greatly. But in terms of the price, no,  
19 not at all.

20 Q. If the Jonssons had a reputation in the industry  
21 whereby they could achieve above market average prices for  
22 their pelts that they sold at market and damage was done to  
23 their reputation, that would be a loss, wouldn't it?

24 A. Possibly. I can't deal with damage to reputation.  
25 That doesn't show up in terms of the prices the pelts get at

1 market. And your reputation isn't how they judge the price  
2 you get. It's on the pelts, not the reputation. Part of what  
3 you're saying is a good point. Part of what you're saying is  
4 not right.

5 Q. Let me switch to sales for a second. Do you know  
6 what the average pelt price at market was in 2009?

7 A. For what? Black or mahogany?

8 Q. For both.

9 A. 2009, the average was \$40.16, and the Jonssons got  
10 39.10.

11 Q. Well, I don't want to know what the Jonssons got.  
12 I just want to know what the average market price for a pelt  
13 was that year. About \$40; right?

14 A. And 37.82 for mahogany, and the Jonssons got 37.

15 Q. Sir, I'd ask you to just answer my question,  
16 please.

17 A. I'm sorry.

18 Q. Thank you very much. So about \$40 a pelt, \$39  
19 between the two kinds; right?

20 A. No. 40 for black. 37.82 for mahogany.

21 Q. Very good. Okay. In 2010, the average price, the  
22 year of the crumlets, the average price form a mink pelt went  
23 up about 50 percent to around \$60; isn't that true?

24 A. Yes.

25 Q. And the year after that, 2011, the average price

1 for a mink pelt went up to about \$75; right?

2 A. Yes.

3 Q. And in 2012, it went up to about \$85; correct?

4 A. Yes.

5 Q. In other words --

6 A. 20 --

7 Q. -- the market for mink pelts from the year right  
8 before the crumlet feeding to two years after it doubled, more  
9 than double; right?

10 A. And it's also up in 2013, yes.

11 Q. Okay. You would acknowledge that the Jonssons have  
12 no control over the prices one can fetch for a mink pelt at  
13 market; correct?

14 A. Yes.

15 Q. So is it fair to say, then, that a mink rancher's  
16 profits from 2009 to 2013 could be expected to increase every  
17 year based on the increase of mink pelt prices during that  
18 time?

19 A. Yes.

20 Q. Now, I think you're aware that there is a quote, a  
21 2013 quote from Patrick Fur Farms indicating that the cost to  
22 purchase one of their breeders in 2013 was \$500 an animal;  
23 right?

24 A. Yes.

25 Q. And back in 2010, at the time of the incident, it



1       only cost \$250 to purchase a breeder from Patrick Fur Farms;  
2       correct?

3             A.     Yes.

4             Q.     So the cost to purchase one of their breeders has  
5       essentially doubled in about three years?

6             A.     Yes.

7             Q.     Jonssons don't have any control over that, do they?

8             A.     No.

9             Q.     And just bear with my hypothetical here.  If to  
10       make the Jonssons whole they need to be able to go out and  
11       purchase comparable breeders to the ones they lost from  
12       Patrick Fur Farms today, it's going to cost them at least \$500  
13       per animal; correct?

14            A.     I don't know that.  If they're purchasing from  
15       Patrick, the answer is yes.  If they're purchasing comparable  
16       to what they were selling, no.

17            Q.     My question was from Patrick Fur Farms.

18                   THE COURT:  Take your turns.

19                   THE WITNESS:  Sorry.  From Patrick Fur Farms, yes.

20            Q.     BY MR. HANCEY:  All right.  Thank you.

21                   Now, throughout your different analyses we just  
22       looked at, you considered some of the historical data relating  
23       to the Jonsson mink operation; right?

24            A.     Yes.

25            Q.     Like auction sale records; correct?

1 A. Yes.

2 Q. Tax returns?

3 A. Yes.

4 Q. But you only considered information going back to a  
5 year or two before the crumlet incident; right?

6 A. No, not quite.

7 Q. Well, let me walk you through that, sir.

8 MR. MITCHELL: Your Honor, can he finish answering  
9 the question?

10 Q. BY MR. HANCEY: I've got your expert report right  
11 here. And they are about --

12 MR. MITCHELL: Your Honor, can he finish answering  
13 the question?

14 THE COURT: I've tried to suggest that throughout  
15 the trial that people take their turns. Put your question.

16 MR. HANCEY: I'll ask a different question, Your  
17 Honor.

18 THE COURT: Listen to the answer. Put your next  
19 question.

20 MR. HANCEY: I'll ask another question.

21 THE COURT: If you've got a question, put your  
22 question.

23 MR. HANCEY: I'm going to do that right now.

24 Q. BY MR. HANCEY: You have several schedules in your  
25 expert report, don't you?

1 A. Yes.

2 Q. And those are the ones we went through on the board  
3 a minute ago; right?

4 A. Yes.

5 Q. Schedule Number 1 includes data from 2011 to 2013;  
6 correct?

7 A. Are you looking at my report?

8 Q. Yes.

9 A. Yes.

10 Q. Schedule Number 2 contains data from 2008 to 2010  
11 and then into the future; right?

12 A. Yes.

13 Q. Schedule Number 3, same thing, go back to 2008;  
14 right?

15 A. Yes.

16 Q. Schedule Number 4, starts at 2011; right?

17 A. Yes.

18 Q. Schedule Number 5 goes back to 2007; correct?

19 A. Yes.

20 Q. 2006, you went back to 2008; right?

21 A. Yes.

22 Q. Two years before the crumlets; right?

23 A. Yes.

24 Q. Schedule 7, you go back to 2008?

25 A. Yes.

1 Q. Schedule Number 8, you go back to 2008; right?

2 A. Yes.

3 Q. 2009 -- sorry. Schedule Number 9, you go back to  
4 2008; correct?

5 A. Yes.

6 Q. Schedule Number 10, you go back to 2008; right?

7 A. Yes.

8 Q. Schedule Number 11, you go through 2008?

9 A. Yes.

10 Q. Those are all the schedules we just went through on  
11 the board; right?

12 A. Yes.

13 Q. Now, when you were analyzing the issues in this  
14 case, you had Dr. Roberts report available to you, didn't you?

15 A. Well, it was after I analyzed it. But, yes. I've  
16 seen two of Dr. Roberts' reports.

17 Q. Okay. And you've also had access to historical  
18 data relating to the Jonsson farm, the Jonsson mink ranch that  
19 goes all the way back to 2003; correct?

20 A. Partly.

21 Q. Dr. Roberts analyzed the data going back to 2003 in  
22 his report, didn't he?

23 A. 2004, yes.

24 Q. And in some cases 2003; right, when that data was  
25 available?

1           A.    No.  There's no analysis.  There's a listing of  
2   some of the data.  But the analysis starts in 2004.

3           Q.    If you had considered the extra years of data that  
4   were available to you, at a minimum you would have been  
5   working from a larger sample size; correct?

6           A.    No.  Your assumption is wrong.

7           Q.    Wouldn't that be a larger sample size?

8           A.    I did look at that data.  I did look at  
9   Dr. Roberts' report.  I did look at the years for '05, '06 and  
10  '07.  I did not include them in my report.  I did look at  
11  them.  I did analyze them.  It's the same.

12          Q.    Mr. Karraker, you looked at all the data, and you  
13  purposely selected the data that was helpful to what you  
14  wanted it to say while ignoring the rest of it; isn't that  
15  true?

16          A.    No, it's not.  The numbers here for 2007 are kits  
17  per litter 4; 2006, 4.6; 2005, 4.3; 2004, 5.3.  That is  
18  consistent with the last three years of 387, 377 and 378.  
19  It's consistent.  I didn't find putting that many more years  
20  in my report useful.  I did look at it.  My results are the  
21  same with those earlier years.

22          Q.    So --

23          A.    My opinions are the same.

24          Q.    So your answer is, I had it available, because it  
25  was the same I just thought I shouldn't use it.

1           A.    No.  I did use it.  I simply presented the earlier  
2   years -- or excuse me -- the later years.

3           Q.    Right.  Now, you've testified today that in your  
4   opinion the Jonssons have suffered no damages whatsoever  
5   relating to the mink that died in 2010; right?

6           A.    No.  What I've said is based on all the financial  
7   information that I have seen, I don't find any damages,  
8   period.  Not the same as your question.

9           Q.    Were you present on the Jonssons' ranch in 2010?

10          A.    Of course not.

11          Q.    You acknowledge that a mink has value; right?

12          A.    Yes.

13          Q.    The animal itself?

14          A.    Yes.

15          Q.    You can sell a pelt for money; correct?

16          A.    Yes.

17          Q.    And you can sell a breeder for money; right?

18          A.    Yes.

19          Q.    And a breeder actually has more value because you  
20   can keep it around and you can breed it for about three years  
21   and get all of the offspring from it; right?

22          A.    Yes.

23          Q.    And you agree that if one has to go out and acquire  
24   a new mink you have to pay for it; right?

25          A.    Yes.

1           Q.    So if the Jonssons lost almost 6,000 mink in 2010,  
2 they suffered a loss, didn't they?

3           A.    The loss does not show up in the financial  
4 information. As far as how many death they actually had and  
5 as far as if they had excess deaths, sure there is a loss.  
6 But it doesn't show up in the financials.

7           Q.    And you have no reason to dispute the data  
8 available to you that the Jonssons in the two years following  
9 the crumlet incident went outside their ranch and purchased  
10 almost 2,000 breeders from external sources; right?

11          A.    No. The number that I've seen is like 1200. Hang  
12 on a second.

13          Q.    Are you sure it's not 1904?

14          A.    I'm sorry. Yeah, it's 1904.

15          Q.    And the data that you've reviewed, sir, for this  
16 case shows that prior to 2010 for the data available the  
17 Jonssons had never before turned to outside sources to  
18 purchase breeders; isn't that correct?

19          A.    No, it's not. They have breeder purchases on their  
20 tax return expenses, and they have capitalized breeder sales.  
21 So, no, there's breeders purchased there before in the earlier  
22 years.

23          Q.    In the really early years.

24          A.    No. I think we can look at '09 and '10 as far as  
25 expenses. Do you want me to do that?

1 Q. Yes.

2 A. All right. That's going to take a couple minutes.

3 (Time lapse.)

4 THE WITNESS: If you have a tax return for me for  
5 '09 and '10 that would help he me.

6 THE COURT: Let me give you an early break, folks.  
7 10 minutes. Remember what I told you.

8 (Whereupon, the jury left the court proceedings.)

9 THE COURT: Give you a chance to round up your  
10 documents.

11 MR. MITCHELL: Your Honor, before we break, before  
12 we break, there are a couple of pages from the -- from  
13 Exhibit 26 that the parties had previously withdrawn by  
14 agreement that we would like to have put back into the record.

15 THE COURT: Yeah. Once we get all the evidence in,  
16 I'll give you a chance to walk through your exhibits and make  
17 sure that those that you need to offer you may offer.

18 MR. MITCHELL: I need to -- I need these pages for  
19 redirect with Mr. Karraker.

20 THE COURT: Well, you can have him identify it and  
21 offer it at that point. Apparently there's no objection.

22 MR. HANCEY: Well, I don't know what they are, but  
23 I can talk to counsel about that.

24 THE COURT: Okay.

25 (Recess.)



1 THE COURT: Did you get your documents okay?

2 MR. MITCHELL: Yeah. Are you okay with this?

3 MR. HANCEY: Yeah. Your Honor, what I'm going to  
4 do when the jury gets come back in, I'm going to withdraw the  
5 question and sit down. So I don't need any documents.

6 THE COURT: Tell me what you've got.

7 MR. MITCHELL: What I've got, Your Honor, was  
8 originally part of Exhibit 26. It is document numbers  
9 PO 001799 and PO 001800.

10 THE COURT: Where did it come from?

11 MR. MITCHELL: It came from Michael Jonsson. It's  
12 a letter from Michael Jonsson to Dr. Roberts. It came from  
13 the documents that Dr. Roberts relied upon in forming his  
14 opinions.

15 THE COURT: Are you fellows stipulating this in?

16 MR. MITCHELL: It was previously stipulated in, and  
17 then as we culled the exhibits, it was withdrawn with the  
18 caveat that if somebody needed it, for some reason the need  
19 came up for trial then it would be offered again.

20 MR. HANCEY: That's true, Your Honor. No  
21 objection.

22 THE COURT: All right. And let's get it marked.

23 MR. MITCHELL: The only --

24 MR. MINNOCK: Hans, I'm going to get one from the  
25 old version.

1 MR. MITCHELL: Okay.

2 MR. HANCEY: Are we doing the handwritten pages or  
3 the backs?

4 THE COURT: Is it the next exhibit in order?  
5 Defendant's Exhibit?

6 MR. MITCHELL: The next exhibit number, Your Honor,  
7 would be Exhibit 50.

8 THE COURT: 50?

9 MR. MITCHELL: Yes.

10 THE COURT: Okay. Why don't we have the clerk mark  
11 it.

12 MR. MINNOCK: I've got to find a single-sided  
13 version first.

14 THE COURT: I'm sorry?

15 MR. MITCHELL: We are looking for a single-sided  
16 version, Your Honor. The versions that we have were  
17 double-sided of the exhibits to keep the bulk down. So we're  
18 looking just for the single-sided versions.

19 THE COURT: Okay. But we can do that down the road  
20 since you're stipulating it in. You're not going to ask  
21 anything about it.

22 MR. MITCHELL: No. I'm actually going to ask him  
23 about the document.

24 THE COURT: Let's get your version, then. I'm  
25 happy to have the clerk go take a photostat of it, too.

1 MR. MINNOCK: Actually that would be easier, Your  
2 Honor, because we're having a hard time finding a copy.

3 THE COURT: That's because you had so many to begin  
4 with.

5 (Time lapse.)

6 THE COURT: Yesterday counsel had volunteered to  
7 modify by extracting, if I remember correctly, your package of  
8 suggested instructions.

9 MR. MINNOCK: Yes. And that's still our intent.  
10 This is the last witness, as I understand it. Right?

11 MR. MITCHELL: Correct.

12 MR. MINNOCK: So after this witness, we're done.  
13 And we thought after that the counsel would get together and  
14 go through and pick the ones we still want.

15 THE COURT: Well, before you do that, I think we're  
16 in a position to where you need to consult with the Judge in  
17 the process, as well.

18 MR. MINNOCK: Yes, absolutely. When would you like  
19 to do that?

20 THE COURT: Immediately following my excusing the  
21 jury.

22 MR. MINNOCK: Okay. Perfect.

23 THE COURT: I may give you a chance to do that and  
24 have you come back a few minutes later.

25 I take it there's just no rebuttal?

1 MR. MERCER: That will depend on this new document  
2 coming in.

3 MR. HANCEY: But it will be very brief.

4 THE COURT: Okay.

5 MR. HANCEY: Your Honor, can I ask the Court's  
6 inclination as to timing of closing arguments?

7 THE COURT: Yeah. Next week.

8 MR. HANCEY: Okay. Great.

9 THE COURT: Not this afternoon.

10 MR. HANCEY: We could go today, but it would be a  
11 little bit of winging it, and that would be helpful.

12 THE COURT: No. Everybody, I'm sure, on the jury  
13 has been thinking about their long weekend.

14 MR. MINNOCK: Us, too.

15 MR. HANCEY: I think you're right.

16 THE COURT: I think you want more of a leisure  
17 deliberation than any kind of a pressure.

18 And is this something your witness has seen?

19 MR. MITCHELL: Yes, Your Honor.

20 THE COURT: Okay. I don't see your number.

21 THE CLERK: I marked it on here. Do you want a  
22 marked copy for you?

23 THE COURT: No, that's fine. Why don't you bring  
24 them in.

25 (Whereupon, the jury returned to the court

1 proceedings.)

2 THE COURT: Go ahead and sit down, folks, and  
3 relax.

4 We'll note for the record that the jury is present,  
5 and counsel and the parties. You may proceed.

6 MR. HANCEY: I withdraw the last question, and have  
7 no further questions.

8 THE COURT: Okay.

9 REDIRECT EXAMINATION

10 BY MR. MITCHELL:

11 Q. Mr. Karraker, you indicated previously that you had  
12 been able to determine that the Jonssons had, in fact,  
13 purchased at least some animals in the years -- from outside  
14 sources in years before 2010. Were you able to find those  
15 documents?

16 A. Yes.

17 Q. And what are those documents?

18 A. Do you want the document numbers or what they are?

19 Q. Were you able to find them in Exhibit Number 6?

20 THE COURT: Why don't you show him your proposed  
21 exhibit, Counselor, and get that from the clerk.

22 MR. MITCHELL: We're not to that one yet, Judge.

23 THE COURT: Oh.

24 THE WITNESS: Yes. There are five different  
25 documents for the years 2009 through 2012.

1 Q. BY MR. MITCHELL: And what exhibit did you find  
2 those documents in? Was it Exhibit 6?

3 A. 6, yes.

4 Q. Okay. And would you, please, identify the title of  
5 each of the documents that you are referring to?

6 A. All right. Capital gains and losses and built-in  
7 gains.

8 Q. For what years?

9 A. '09, '10, '11 and '12. And then also Statement 5,  
10 other expenses for 2009.

11 Q. Okay. And what information on those documents  
12 indicates to you that the Jonssons were purchasing breeders  
13 from outside sources prior to the incident in this case?

14 A. Well, 2009 has a small amount of mink purchases,  
15 meaning they were expensing it. And then in the years 2009  
16 through 2012 there are long-term capital gains and losses,  
17 which means they were capitalizing it. And so when you  
18 purchase a breeder mink for, let's say, \$100, you keep it for  
19 three years and then you sell it later, it shows up on these  
20 capital gains. And they have that in all years '09 through  
21 '12. So in other words, when they purchase something in '09  
22 they don't sell it until '11.

23 So these five documents say they were purchasing  
24 breeder mink earlier. It doesn't tell me how many, how much.

25 Q. Okay.

1                   Where is proposed Exhibit 50?

2                   THE CLERK: Right here.

3                   Q. BY MR. MITCHELL: Mr. Karraker, I've handed you  
4 what has been marked as Exhibit 50 for identification  
5 purposes. And earlier you referenced that you had seen a  
6 memorandum that indicated that the plaintiffs were, in fact,  
7 shifting from a black, a black herd or a black dominated herd  
8 to a mahogany, more of a mahogany composition within their  
9 herd. Is that the document to which you were referring?

10                  A. Yes.

11                  Q. And I'll refer you to the page that is numbered  
12 PO 001800 and ask you to read item Number 5 from that  
13 document.

14                  MR. HANCEY: I'm going to object to foundation.  
15 There's no evidence that this witness knows what this document  
16 is.

17                  MR. MITCHELL: Your Honor, this exhibit has been  
18 stipulated to.

19                  MR. HANCEY: Its admissibility, Your Honor, but not  
20 his personal knowledge of it.

21                  THE COURT: Well --

22                  MR. HANCEY: It is not clear.

23                  THE COURT: We're interested to have him indicate  
24 when and where he saw it.

25                  MR. MITCHELL: Sorry?

1 THE COURT: When and where did he see the document?

2 MR. MITCHELL: Okay.

3 Q. BY MR. MITCHELL: Mr. Karraker, have you seen this  
4 document before?

5 A. Yes.

6 Q. And where did you see it?

7 A. In documents that came to me in connection with  
8 Dr. Roberts' report.

9 Q. And what is your understanding of the nature of  
10 this document?

11 MR. HANCEY: Objection; foundation.

12 THE COURT: Well, if you know.

13 THE WITNESS: Well, it has Michael Jonsson on it,  
14 and it is a quote that speaks for itself.

15 Q. BY MR. MITCHELL: And would you go ahead and read  
16 item Number 5, please.

17 MR. HANCEY: Same objection. Request a voir dire.

18 THE COURT: Overruled.

19 THE WITNESS: After the sale in the spring of 2010,  
20 the market for black mink and mahoganies were comparable, so  
21 we decided to something after black females since we had extra  
22 females, anyways. And by doing this, we decreased in blacks  
23 and showed an increase in mahogany.

24 Q. BY MR. MITCHELL: Thank you. Okay. You were also  
25 asked about whether one would expect an increase in profits



1 for a mahogany -- a mink rancher if the prices for mink pelts  
2 were also increasing during a given time period. Do you  
3 recall that?

4 A. Well, that wasn't quite the question. But, sure,  
5 prices were going up.

6 Q. The gist of it is what I'm getting at.

7 A. Okay.

8 Q. Have your analyses taken into account price  
9 fluctuations for purposes of determining whether the  
10 plaintiffs actually suffered a loss or not?

11 A. Sure.

12 Q. And how did your analyses take that into account?

13 A. That's why we look not just to prices, but we also  
14 have to look at the total amounts and particularly the total  
15 amounts per breeder. So if the total amounts per breeder,  
16 which they are up afterward, price isn't an issue. You're  
17 doing better after in terms of producing mink, and then you  
18 also enjoy that higher price.

19 So the key issue here is, how are they doing in  
20 terms of the actual unit sales, either in the pelt to market  
21 or the live sales?

22 Q. Thank you.

23 In case it needs to be done, Your Honor, we would  
24 go ahead and offer Exhibit 50.

25 MR. HANCEY: No objection.

1 THE COURT: And offered and received.

2 (Whereupon, Defendant's Exhibit 50 was received.)

3 MR. HANCEY: No objection.

4 MR. MITCHELL: And I have no further questions for  
5 this witness.

6 THE COURT: Thank you, sir. I appreciate your  
7 help. You may be excused absent objection.

8 THE WITNESS: Thank you, sir.

9 MR. MINNOCK: Your Honor, with the conclusion of  
10 that witness, National Feeds rests.

11 MR. MITCHELL: And so does Rangen.

12 THE COURT: Any rebuttal?

13 MR. MERCER: One minute, please, Your Honor.

14 (Discussion with counsel.)

15 MR. HANCEY: No rebuttal, Your Honor.

16 THE COURT: Okay. Okay. The Court and counsel,  
17 ladies and gentlemen, have a number of questions that need to  
18 be resolved that will not require your presence for a while.  
19 And rather than have you just stick around and wonder what  
20 we're doing, I'm going to let you go home a little bit early.  
21 Or if you want to go shopping or go to a movie, I won't tell  
22 anybody.

23 But what I'd like you to do, if you would, please,  
24 is remember now that we've heard all of the evidence that you  
25 remember not to talk to anybody about the evidence. The next

1 step in this process is for the attorneys to have the  
2 opportunity of arguing their respective cases to you. I  
3 anticipate that the Court and counsel will have some questions  
4 that will require some time, so I'm going to let you go home  
5 early. I'd like you to come on back on Tuesday. For some  
6 people, most people there's a holiday on Monday. And I want  
7 you to go home and forget about the case. The attorneys will  
8 remind you what you heard when we have you come back. I think  
9 probably it makes sense to have you come back at about  
10 10 minutes to 1:00 on Tuesday, and we'll get started right at  
11 1 o'clock. The chances are that after hearing from counsel  
12 and the Court that you may desire to work later than usual or  
13 you may not. So those that you care about or who care about  
14 you, alert them to the fact that on Tuesday afternoon you may  
15 work a little longer than usual, or longer if you so desire.

16 It's important that you not talk to anybody about  
17 the case, read anything about it. Skip the Tweeting, skip the  
18 Facebook, skip all of those electronic things. We've heard  
19 what we've heard. And you'll have a chance to make your  
20 decision after argument and instruction with the Court.

21 It looks look a pretty day out there. And I'd kind  
22 of like to go home early, too, but I don't know whether I can  
23 or not. But at any rate, at this point you'll be excused, and  
24 we'll see you back here not on Monday. Enjoy the long  
25 weekend. Tuesday, 10 minutes to 1:00. Anybody in doubt on

1       that? Stay well. Stay well. We need all of you. So come on  
2       in. And you may be excused.

3               (Whereupon, the jury left the court proceedings.)

4               THE COURT: I think it might be worthwhile at this  
5       point if there are exhibits, and there were some that were  
6       identified as disputed, to make sure that all of your exhibits  
7       are appropriately offered and received. We sustained the  
8       objection as to Exhibit 14, if I remember correctly.

9               MR. HANCEY: Yes, Your Honor.

10              THE COURT: Are there others that have yet to be  
11       offered or received?

12              MR. HANCEY: What was the number of this new one?  
13       50?

14              THE COURT: 50 has been received by agreement.

15              MR. MITCHELL: Yes. He was just wondering what the  
16       number was.

17              THE COURT: Yeah. 50.

18              MR. MINNOCK: Well, some of these like 22, 23,  
19       there was concept about admitting them, if necessary.

20              MR. HANCEY: Yeah. Those are out. Yeah. The lab  
21       reports are in. We don't need those.

22              MR. MINNOCK: So 22 and 23 can come out. Other  
23       than that, I believe everything has been --

24              THE COURT: You're withdrawing those?

25              MR. MINNOCK: Yeah. The parties are jointly

1 withdrawing those. I believe as I look through here all the  
2 remaining exhibits have been either admitted, excluded or  
3 withdrawn. Is that what you understand?

4 MR. HANCEY: The only thing I would add to that is  
5 we need to offer Exhibit 19.

6 MR. MINNOCK: 19. 19. 19. Oh, yeah. I mean --

7 MR. MITCHELL: I think that one needs to come out,  
8 then.

9 MR. MINNOCK: So 19. And we'll remove these from  
10 the books. But 19, 22 and 23 have not been dealt with, but  
11 are now withdrawn.

12 THE COURT: Everything else is in?

13 MR. MINNOCK: Everything else is in.

14 THE COURT: By agreement with the exception of 14?

15 MR. MINNOCK: Right.

16 MR. MERCER: Correct. And, Your Honor, is there a  
17 method by which Exhibit 14 remains part of the record as an  
18 unreceived?

19 THE COURT: It's part of my record.

20 MR. MERCER: Okay.

21 THE COURT: It won't be made available to anybody  
22 else.

23 MR. MERCER: Exactly. Thank you.

24 MR. MITCHELL: Your Honor, at this time Rangen has  
25 a motion for partial directed verdict that we would like to

1 submit to the Court.

2 THE COURT: Why don't you just tell me what it is.

3 MR. MITCHELL: The gist of it is, Your Honor, that  
4 Dr. Hall is the only causation witness that plaintiffs have  
5 offered, and Dr. Hall has testified that he could offer no  
6 opinion regarding causation with regard to the feed for any  
7 period beyond whelping to weaning in 2010, and we believe that  
8 the jury -- we are entitled to judgment as a matter of law  
9 with regard to damages beyond the end of the weaning period in  
10 2010. And the jury should be so instructed.

11 MR. MINNOCK: And National Feeds would join that  
12 motion, Your Honor.

13 THE COURT: Does counsel wish to talk about that?

14 MR. HANCEY: Yes, Your Honor. We disagree with  
15 that characterization of Dr. Hall's testimony. Dr. Hall said  
16 that his focus was on the 2010 damages. But he also discussed  
17 studies where reproductive effects were shown by nitrosamines  
18 in first and second generations of animals. He talked about  
19 the 4,000 mink. He talked about the 1500 mink. He talked  
20 about the 400 breeders that died. And Dr. Roberts has tied in  
21 damages in other years back to 2010. In other words, you  
22 can't -- you can't draw a line in the sand and say that the  
23 breeder-related damages that relate to breeders that died in  
24 2010 and carried over in other years aren't something that the  
25 jury can consider. I mean, those flow --

1           THE COURT: That's part of the your whole theory,  
2 isn't it?

3           MR. HANCEY: Absolutely.

4           THE COURT: You're talking about not just the  
5 breeder, but what, the breeders' progeny.

6           MR. HANCEY: Absolutely. And the financial  
7 implications on the Jonssons.

8           THE COURT: Sure.

9           MR. HANCEY: Having to go out and buy other mink  
10 that they wouldn't have to buy if not for 2010. It all ties  
11 together nicely.

12          THE COURT: Okay. Were you going to file that?

13          MR. MITCHELL: Yes, Your Honor. And I think  
14 Mr. Minnock has some comments, and I have some comments, as  
15 well.

16          MR. MINNOCK: Well, the Court will recall that he  
17 was specifically asked the question actually by Mr. Hancey:

18               What about the loss of production in 2010?

19               He said: I believe that the neonatal losses are  
20 attributable to the crumlets from weaning -- or whelping to  
21 weaning so May and June.

22               And Mr. Hancey followed up and said: Well, they  
23 talked about 1500 additional mink that died later in the year.

24               He said: I cannot state that those died due to  
25 eating the lactation crumlets. The same thing. And so he

1 said it had to be during the exposure period.

2 Now, what Dr. Roberts has is he has production  
3 losses in future years, which as Dr. Hall indicated he does  
4 not believe were caused by this. He will not render that  
5 opinion.

6 THE COURT: Well, how about the loss to those that  
7 died during the period that you talked about and the potential  
8 they had for creating babies down the road, and they in turn  
9 had a potential for creating babies down the road?

10 MR. MINNOCK: Well, I guess maybe the motion is  
11 perhaps, and I'll let Mr. Mitchell speak to this, I don't  
12 think it was narrowly down -- his motion relates narrowly to  
13 those kits. I do think if there was a breeder that died, then  
14 that's one thing. But going to future years and saying, well,  
15 there were breeders that died in 2011 or 2012 or 2013 where in  
16 2011 they had a decline in production or 2012 or 2013, that's  
17 where Dr. Hall said, I cannot sign off on that. So it's got  
18 to be an animal that actually was alive during May and June  
19 and either died or died sometime that year.

20 THE COURT: Yeah. I as an animal die during that  
21 period, my progeny die with me.

22 MR. MINNOCK: Right. But the way that Dr. Roberts  
23 has calculated damages, he's done it in three discrete years.  
24 And that's the problems we have. Go ahead.

25 MR. MITCHELL: I was just going to say, I think I



1 understand the point that Your Honor is trying to make. And  
2 the motion is not quite so restrictive as that might suggest.  
3 The motion itself does not contemplate instructing the jury  
4 how to calculate damages. It simply limits the jury's  
5 consideration to the period in which those damages might have  
6 accrued.

7 So, for example, if the jury were to conclude that  
8 a breeder, in fact, died during that time period and if they  
9 found that its value included the production that one might  
10 realize in future years, that loss would have occurred within  
11 that period, and I think that would be within the discretion  
12 of the jury. But that is for the jury to decide and the jury  
13 to consider. And based upon what Dr. Hall has --

14 THE COURT: Do you have the transcript?

15 MR. MITCHELL: We have ordered it. It hasn't  
16 been -- it's not quite ready yet. At least they haven't  
17 indicated it's ready yet. I think we were -- Tuesday was what  
18 we were looking at, but it has been ordered. And you might  
19 recall Dr. Hall actually said it twice. And he said it in  
20 direct, and he indicated that it was the neonatal period. And  
21 when he was brought back the second day, and on redirect,  
22 Dr. Hall clarified that with regard to the 1500 animals that  
23 died throughout the year, he couldn't opine that any animals  
24 that died beyond the whelping period were, their deaths  
25 related to the crumlets. But if a portion of those 1500 died

1 in that period, he would attribute that to his crumlets. That  
2 was his testimony.

3 THE COURT: I'll reserve on your motion. I'll read  
4 the transcript.

5 MR. MITCHELL: Thank you, Your Honor.

6 MR. MINNOCK: Your Honor, at this time I on behalf  
7 of National Feeds would make a motion to dismiss any claim for  
8 punitive damages.

9 THE COURT: It's already been dismissed.

10 MR. MINNOCK: Oh, thank you.

11 THE COURT: On the Court's own motion. I struck  
12 it.

13 MR. MINNOCK: Okay. Thank you. I wasn't sure on  
14 that. Thank you.

15 MR. MERCER: Your Honor, I don't recall the Court  
16 officially striking punitive damages.

17 THE COURT: Well, I commented that somebody in  
18 their suggestions for instructions asked about punitive  
19 damages, and I indicated this wasn't a punitive damages case.

20 MR. MERCER: May I address that, Your Honor?

21 THE COURT: No. The motion is granted. No  
22 punitive damages, period. Let's move on. It's not a punitive  
23 damages case.

24 MR. MERCER: If I can take two minutes on punitive  
25 damages. The reason it's a punitive damages case is because

1 Ken Griffeth contacts manufacturer and supplier in August and  
2 says, I think you have some poison feed. I've got dead mink  
3 on three ranches. Both National Feed and Rangen at that point  
4 had samples of that very batch. Neither National Feed nor  
5 Rangen took any steps to test that batch, instead said --  
6 instead embarked on this defense campaign deny, deny, deny.

7           The evidence is that damage was incurred from June  
8 to November. It was said over and over. The information was  
9 given in August. Damages incurred from August to November,  
10 were incurred because these defendants knowingly, they had the  
11 information that their feed was poison. They had samples of  
12 the feed, both of them had them. And the Court yesterday said  
13 it was exquisitely interesting why neither of those parties  
14 conducted any test. Had they conducted their tests, what  
15 would have happened? They would have said, you're right. We  
16 don't want any more mink to die. We have figured out the  
17 problem, and we are going to resolve the problem and here's  
18 what we suggest you do. Instead the campaign was deny, deny,  
19 deny.

20           If these were human deaths, if someone called Tyson  
21 Chicken and said, we've got deaths at three restaurants,  
22 people have died at three restaurants and we tied it to your  
23 chicken, and Tyson instead of recalling every single chicken  
24 says, we don't think it was us, and takes no action, we would  
25 be outraged.

1           THE COURT: Tell me in the record that you've made  
2 here in court, particularly as to the testimony that was  
3 offered by your witnesses, where that discussion occurred,  
4 where someone related that they had called that to the  
5 attention more than once over a period of time, I'm happy to  
6 look at that. But my memory is that there was, well, some  
7 colloquy with counsel and some indication that no tests were  
8 given. No tests were made. I don't recall the rest of it.

9           MR. MERCER: Okay. Let's talk about that. It's  
10 clear that there is -- there is no evidence that no tests were  
11 made. So either tests were made and not disclosed, or tests  
12 were not made. Both equally reckless.

13           THE COURT: I think that that's a very interesting  
14 observation in dealing with the question raised by our  
15 traveling consultant as to the quantity of it adulterous  
16 material being sufficient to reach a particular threshold,  
17 so-called. I think it's telling. It is telling that no tests  
18 have been made on the part of those who controlled the tests.  
19 And I think that's a very persuasive kind of commentary on  
20 whether or not the food for mink was adulterated. If you're  
21 in a position to say, hey, I ran the test, this is what we do  
22 for control, this is how we make sure our mixers mix correctly  
23 and provide material that bears our label, I think that that  
24 can be very persuasive in reference to the existence of a  
25 defective product.

1           But I'm stuck with the record at this point as you  
2       are. This is not a punitive damage case based on the record  
3       that I've seen. So the motion I thought had heretofore been  
4       taken care of. But if it wasn't clear then, it is now.  
5       Motion denied.

6           MR. MERCER: Thank you, Your Honor.

7           THE COURT: The motion is denied.

8           MR. MINNOCK: You mean motion granted.

9           THE COURT: Is affirmed as granted. There are no  
10      punitives there.

11          MR. HANCEY: Well, Your Honor, we want to make  
12      another motion for directed verdict on a couple of issues that  
13      I think will clarify the jury instructions that are going to  
14      be presented to the jury and what can be argued in closing  
15      argument, if I can take just a few minutes.

16          THE COURT: Sure.

17          MR. HANCEY: The first one I guess one of the  
18      instructions that the defendants wanted in there, I guess  
19      there's two of them that are sort of related, is that the  
20      Jonssons had, whether or not the Jonssons had some comparative  
21      fault.

22          THE COURT: We're not dealing with comparative  
23      fault. There's no evidence on comparative fault.

24          MR. HANCEY: And nor is there any evidence that the  
25      Jonssons failed to mitigate damages. So we would ask the

1 Court to --

2 THE COURT: No. We're not going to give  
3 mitigation. We are not going to give comparative fault.

4 MR. HANCEY: The other thing that I would ask the  
5 Court to strike is any argument to the jury concerning the  
6 label that was on the bag that was never brought up in  
7 evidence except for the fact that the Jonssons never saw it.  
8 That's the label that has the warranty disclaimer and the  
9 limitation of liability.

10 THE COURT: That really is a curious kind of thing  
11 because of the flyers, the touting of the efficacy of the  
12 product.

13 MR. HANCEY: Right.

14 THE COURT: You can't say on the one hand, this is  
15 great, folks, and on the other hand say, but don't believe us.

16 MR. HANCEY: That's correct. And it has to be the  
17 basis for the party's bargain, and there's no evidence that  
18 the Jonssons even knew about those provisions let alone  
19 understood them. So I think that has to come out and can't be  
20 argued.

21 MR. MINNOCK: Well, I'd like to be heard on that  
22 issue.

23 MR. HANCEY: Let me finish my motion.

24 Let's see. The other one, Your Honor, has to do  
25 with our warranty claims. We've got clearly an express

1 warranty claim against National because of the advertisements  
2 the Court just referenced, and we have implied warranty  
3 claims, too, against National. The issue with those warranty  
4 claims as to Rangen is a little bit different because under  
5 the UCC the Jonssons can be a third-party beneficiary to any  
6 warranties made by Rangen to National such as the ones that  
7 were brought up in the evidence in their own contract.

8 THE COURT: Yeah. Let's defer on that for a few  
9 moments --

10 MR. HANCEY: Okay.

11 THE COURT: -- or a few hours or a few days.

12 MR. HANCEY: Okay.

13 THE COURT: And I'd like to chat for a minute as to  
14 your legal propositions. You say defect. Well, what's the  
15 defect?

16 MR. HANCEY: Well, before this trial counsel got  
17 together and we agreed this is not a design defect case.

18 THE COURT: Well, that's fine.

19 MR. HANCEY: We think it's a manufacturing defect  
20 case.

21 THE COURT: Well, whatever it is. It's a defect.

22 MR. HANCEY: Correct.

23 THE COURT: It's a defect in a product.

24 MR. HANCEY: Absolutely, yes.

25 THE COURT: It's a product that is put in commerce.

1 MR. HANCEY: Yes.

2 THE COURT: And you say, well, how was the product  
3 manufactured? Well, the product was jointly made by National  
4 and by Rangen. They both had input.

5 MR. HANCEY: Yes.

6 THE COURT: The product was a product of the effort  
7 on the part of both of them.

8 MR. HANCEY: Yes.

9 THE COURT: It's a product. It's allegedly defect,  
10 within an alleged defect, I should say, which under your  
11 theory is dangerous to mink. It's placed in commerce. That's  
12 a strict liability concept. There's no negligence involved in  
13 that concept at that point.

14 MR. HANCEY: Right. They're separate.

15 THE COURT: And at that point in time, you say, oh,  
16 by the way, now you said it was good stuff, your so-called  
17 express warranty.

18 MR. HANCEY: Right.

19 THE COURT: But they said what they said. It's  
20 good stuff. You say defective. Well, okay. Good stuff.  
21 That's really the other side of the coin. If it's a product  
22 and if it's defective, and if it's failed and if there's a  
23 consequence, if there's causation and damage of any kind,  
24 however you measure it, why worry about merchantability? Why  
25 worry about warranty? Why worry about negligence?



1           MR. HANCEY: I agree. That there are lots of  
2 different causes of action that can attach here, but they all  
3 sort of evolve around the same concepts that the Court has  
4 just mentioned. I mean, it was a product. We allege it was  
5 defective. It caused damages. It was in the stream of  
6 commerce. They both sold it. They both participated in the  
7 manufacturing process. They made claims about it. Mink died.  
8 That's our case.

9           THE COURT: Well, why do you have to tell them five  
10 times? Why don't you just tell them once?

11           MR. HANCEY: Well, Your Honor, our proposed special  
12 verdict form is as simple as they come.

13           THE COURT: I've looked at your form, but I'm  
14 looking at your pleadings and I'm looking at the pretrial  
15 order.

16           MR. HANCEY: Yeah.

17           THE COURT: And I'm looking at all of that stuff.

18           MR. HANCEY: Probably being overly cautious. But  
19 you're correct, there's some overlap there. And that's just  
20 how this particular area of the tort law works. But, I mean,  
21 well, it all comes down to liability or not.

22           THE COURT: Let's start out. The product was a  
23 joint product, wasn't it?

24           MR. MINNOCK: Well, it's our formula and their  
25 ingredients, and they mix it.

1 THE COURT: Sure. And they were happy enough to  
2 label it for you and bag it and ship it off into commerce.

3 MR. MINNOCK: Yeah.

4 THE COURT: And tell you who to bill.

5 MR. MINNOCK: Right.

6 THE COURT: And your happy salesman up in Seattle  
7 touted the formula that was wonderful and would grow superior  
8 fur and help people raise big babies.

9 MR. MINNOCK: Right.

10 THE COURT: Okay. Joint product.

11 MR. MINNOCK: Well, it's joint in the sense that,  
12 yeah, it's our product. It's National Feed's product.

13 THE COURT: It's their product, too.

14 MR. MINNOCK: Well, Rangen manufactures it.

15 THE COURT: You bet. So when it comes to the  
16 question of defective product, you see, you're both on the  
17 hook.

18 MR. MINNOCK: Well, I think that's an accurate  
19 statement of the law under strict liability is that -- is that  
20 anybody in the stream of commerce is going to be held strictly  
21 liability. I don't know that there's a dispute about that.

22 THE COURT: Okay.

23 MR. MINNOCK: I think you're probably right. This  
24 is a question of whether or not there is strict liability, and  
25 all other causes of action are superfluous.

1           THE COURT: Maybe people ought to think about that.  
2 Well, you've got arguments from various witnesses that confuse  
3 mortality to bank with balance sheets or income statements.

4           MR. MITCHELL: I'm sorry? I couldn't hear that,  
5 Judge. What was your last comment?

6           THE COURT: Well, I don't often ask this question,  
7 but I'll ask it just for the heck of it. Have you ever  
8 thought about resolving this case?

9           MR. MITCHELL: We have -- we've undertaken  
10 significant effort in that regard, Your Honor.

11          THE COURT: Just a how much case?

12          MR. MINNOCK: Well, I don't think it's just a how  
13 much case. I mean, I think, you know, based on the documents  
14 that we've seen and our experts have indicated we don't see  
15 that they've suffered a loss.

16          THE COURT: No babies died.

17          MR. MINNOCK: Well, I'm not saying -- you know, the  
18 history of this case is that, you know, you've seen it in the  
19 documents.

20          THE COURT: No babies died?

21          MR. MINNOCK: Michael Jonsson sent a letter and  
22 said, 4,000 babies weren't born.

23          THE COURT: No. No. My question is, did any  
24 babies die?

25          MR. MINNOCK: I don't -- well, according to their

1 records, no.

2 THE COURT: Okay. No babies died.

3 MR. MINNOCK: Not according to the documents  
4 provided.

5 THE COURT: No feed was deleterious.

6 MR. MITCHELL: Correct.

7 THE COURT: No. It's perfectly good feed. That's  
8 why we've tested it.

9 MR. MITCHELL: Your Honor, we have 17 different  
10 tests of this feed both by National and the plaintiffs.  
11 National has tested the retained samples and produced those  
12 documents.

13 THE COURT: You produced -- you tested the --

14 MR. MINNOCK: Wait. Wait. There's two samples  
15 here. When it gets done, one sample is taken and divided in  
16 half.

17 THE COURT: I understand.

18 MR. MINNOCK: Half is kept by Rangen, and half is  
19 kept by National. The statement that Mr. Mercer made is  
20 absolutely incorrect. When Mr. Griffeth indicated he thought  
21 that there was a problem with the feed and described what he  
22 thought was the problem with the feed, National immediately  
23 took its sample out and had it tested and, in fact, consumed  
24 the entire sample doing the test that Mr. Griffeth wanted  
25 done.

1           The reason we don't have tests on nitrosamine is  
2           because we don't have a sample anymore because Mr. Griffeth  
3           said, I want you to do these tests all the way down the road.

4           THE COURT: But your partner has a sample.

5           MR. MINNOCK: That's true.

6           THE COURT: And did you test that for nitrites?

7           MR. MITCHELL: No, Your Honor. By the time  
8           nitrites became an issue and nitrosamines in this case --

9           THE COURT: Have you ever thought of taking that  
10          sample right now and have it tested?

11          MR. MITCHELL: We have -- the thought -- we  
12          actually offered --

13          THE COURT: No. I'm not interested in offers.  
14          Right now. Have it tested.

15          MR. MITCHELL: No. I mean, we're at the end of the  
16          trial.

17          THE COURT: Well, we could always reopen.

18          MR. MINNOCK: Well, I think it's -- I think part of  
19          the reason that the whole testing issue is really a nonissue  
20          is there is not a dispute in this case that nitrosamines were  
21          found in the feed.

22          THE COURT: Yeah. And you've acknowledged that  
23          before.

24          MR. MITCHELL: Correct.

25          MR. MINNOCK: So there's no reason to test Rangen's

1 sample to say, is there, in fact, nitrosamines?

2 THE COURT: Well, you acknowledge nitrosamine. And  
3 then the question becomes quantity.

4 MR. MINNOCK: The question becomes quantity.

5 THE COURT: Sure.

6 MR. MITCHELL: And we've had multiple tests of the  
7 feed.

8 THE COURT: And there's no question that  
9 nitrosamine can have an adverse affect upon the health of  
10 mink.

11 MR. MITCHELL: No. When the levels get to the  
12 right, when it gets to the right levels, no, there is no  
13 question about that.

14 THE COURT: Okay.

15 MR. MITCHELL: Your Honor, I would like to comment  
16 on the issue regarding -- a couple of issues that have been  
17 brought up which I haven't had an opportunity to talk about  
18 yet. One is the issue of mitigation, and there is ample  
19 evidence in this case of plaintiff's failure to mitigate.

20 THE COURT: What should they have done that they  
21 didn't do that you put on the witness stand?

22 MR. MITCHELL: They should have called a  
23 veterinarian to come out and look at their animals. They  
24 should have replaced the breeders sooner than they did. They  
25 should have retained the breeders that they did sell to

1       replace any that, in fact, died. They should have had  
2       necropsies performed. They should have performed feed  
3       analyses much sooner than was done. What else can I think of.

4               THE COURT: And I guess you should have tested the  
5       stuff.

6               MR. MITCHELL: I'm sorry?

7               THE COURT: I said, I guess you should have tested  
8       the stuff.

9               MR. MITCHELL: It's been tested ad nauseam. There  
10       are no tests that we can do that are going to add anything to  
11       this collective mix.

12              THE COURT: Well, they would certainly indicate  
13       concentration. They would certainly indicate sufficient,  
14       sufficiency as far as causation goes.

15              MR. MITCHELL: We already have those tests. The  
16       plaintiffs already performed those tests.

17              THE COURT: Well, it's kind of fuzzy and  
18       interesting.

19              MR. MITCHELL: And then the other issue was under  
20       Utah law fault has to be apportioned among the parties. So we  
21       would ask that that apportionment occur on the verdict form,  
22       as well.

23              THE COURT: Well, there's been no evidence of fault  
24       on their part as far as I can see in the record. It's a  
25       strict liability case with redundancies. But I'm perfectly

1 capable of telling the jury five times what we ought to tell  
2 them once. But that's something counsel can be of help on.

3 MR. MINNOCK: Your Honor, I think that you're  
4 probably right on comparative fault. I think that the issues  
5 we've raised relate more to mitigation that should be  
6 presented to the jury. But I agree they probably don't need  
7 to be on the special verdict for in terms of -- there's no  
8 showing of their fault in terms of putting the --

9 THE COURT: And you should have called a vet, you  
10 know.

11 MR. HANCEY: Well, Your Honor, the undisputed  
12 evidence is that they did call a vet.

13 THE COURT: Well, and he's kind of busy.

14 MR. HANCEY: In May of 2010.

15 MR. MITCHELL: Funny a vet has not testified to  
16 that.

17 MR. HANCEY: The vet is dead.

18 MR. MITCHELL: I didn't know he has passed.

19 MR. HANCEY: Yeah. The vet is dead.

20 THE COURT: Well, there are all kinds of  
21 interesting things there. I think I'll let you go to lunch.  
22 Why don't you come back and see me maybe at 1:15, if that's  
23 convenient. Play with your requests. Extract those that you  
24 think don't pertain, and we'll then chat some more. I'm  
25 interested in properly instructing the jury, and obviously



1 it's a contentious case. It's a fascinating case. It's one  
2 that has I think great interest in the intersection between  
3 law and science and statistics, matters of that kind. I think  
4 we should all make great effort to make it as simple as  
5 possible for the fact finders.

6 When we chat again, I'll be asking plaintiffs as to  
7 what specific proposition of law that you're referring to in  
8 reference to those events, parties where you're trying to  
9 stick one or the other of the defendants on a separate legal  
10 proposition.

11 MR. HANCEY: We'll do that, Your Honor.

12 THE COURT: And you might think as well as to the  
13 need for redundancies.

14 Well, let me give you a little more time. Why  
15 don't we say 1:30, and that will give you a chance to eat as  
16 well as talk with one another in reference to your suggested  
17 requests. Quite often I make up instructions of my own which  
18 I think meet what facts I've heard, but we have the  
19 opportunity of looking at what we propose to give by way of a  
20 package, and that's why I've asked the jury to come back in  
21 the afternoon on Tuesday rather than the morning.

22 So let's see what you've got this afternoon, and  
23 we'll see what we can be helpful on. And maybe I'm wrong, but  
24 if you've got a good customer who's been buying feed from you  
25 for a while and if repeat customers are worthwhile in the feed

1 business, you ought to chat about those who deal with risk and  
2 see if folks can arrive at a particular sum that doesn't make  
3 everybody happy but often makes everybody content with new  
4 friendships or renewed friendships, let's put it that way.

5 Well, I preach too much. 1:30. Bring me your  
6 package. Make sure that the clerk has the appropriate  
7 documents.

8 (Lunch recess.)

9 THE COURT: How are we doing on instructions?

10 MR. HANCEY: Well, I think we made a lot of  
11 progress, Your Honor. We agreed to -- well, first of all, we  
12 agreed to unclutter the verdict form by getting rid of some of  
13 our claims. And --

14 THE COURT: Well, let's talk about instructions.  
15 Which ones are you --

16 MR. HANCEY: Okay. I have them here. We agreed to  
17 get rid of instruction Number 1 and Number 2 and Number 3 and  
18 4. We agreed to get rid of Number 7 and Number 8. And we  
19 agreed -- well, maybe we have to have some discussion on  
20 Number 18, but I think for the most part we agreed to  
21 eliminate it.

22 MR. MITCHELL: Yeah. There's substantial  
23 agreement. There's just one fact that's coming -- that is in  
24 18 right now that we're working out how to deal with it, and I  
25 believe we'll be able to reach some sort of agreement.

1           MR. HANCEY: Yeah. So we're pretty much okay for  
2           the Court not reading the stipulated facts Instruction 18.

3           THE COURT: Well, you've previously withdrawn that  
4           before. The last time we talked about instructions on the  
5           record you indicated that you would eliminate and rely upon  
6           the testimony.

7           MR. HANCEY: Right. Yes. And we agreed to remove  
8           Number 19 and Number 21 and Number 24. We agreed to remove  
9           Number 39 and Number 40, 41. We agreed to remove Number 44  
10          and Number 45 and 46 and 47. We agreed to remove Number 55  
11          and 56 and 57.

12          What did you decide on 58, Hans?

13          MR. MITCHELL: I think since -- we'll want to keep  
14          Number 58 in.

15          MR. HANCEY: Okay. We agreed to remove Number 59.

16          What about 60? That was a question mark.

17          MR. MITCHELL: I think we'll need to keep 60 in, as  
18          well.

19          MR. HANCEY: Okay. We agreed to remove Number 61.  
20          We agreed to modify Number 63, Your Honor, to remove any  
21          language indicating comparative fault on the part of the  
22          plaintiffs. But the defendants want to keep the instruction  
23          in concerning comparative fault amongst themselves.

24          THE COURT: Okay. Your next?

25          MR. HANCEY: We -- well, let's see. We agreed

1 to -- well, we think the Court has already ruled on  
2 instruction Number 68, mitigation of damages, but I think the  
3 defendants want to argue on that one.

4 THE COURT: And your next one?

5 MR. HANCEY: We agreed to remove 69 and 70 per the  
6 Court's order, and 71. And that's it.

7 THE COURT: Okay. Tell me what substantive claims  
8 remain.

9 MR. HANCEY: The substantive claims that remain,  
10 Your Honor, are negligence, strict liability and express  
11 warranty.

12 THE COURT: Okay. And let's take a moment and talk  
13 about your legal propositions in reference to each one of  
14 those.

15 MR. HANCEY: Well, okay. So on the negligence and  
16 strict liability claims, we kind of talked about it before the  
17 break, our claim is that we have an adulterated product that  
18 is in the stream of commerce. We have an undisputed seller  
19 and a manufacturer. They both participated in its production.  
20 And it was sold to the Jonssons, and they used it and caused  
21 them damages.

22 THE COURT: Okay.

23 MR. HANCEY: On the --

24 THE COURT: That's your strict liability claim or  
25 negligence claim?

1 MR. HANCEY: That's on both of them. Those are  
2 really the underlying facts.

3 THE COURT: You can't do both because if you have  
4 strict liability, negligence isn't a question. I mean, it's  
5 there, you know.

6 MR. HANCEY: Yeah. Well, we understand there's  
7 overlap, Your Honor. And it's true, the same facts underpin  
8 both of those claims. But we're not comfortable simply  
9 getting rid of one or the other because --

10 THE COURT: Well, is the negligence question on  
11 strict liability?

12 MR. HANCEY: Well, negligence is also a standalone  
13 claim, as I understand it.

14 THE COURT: No. No. That's not my question.

15 MR. HANCEY: Oh, okay.

16 THE COURT: Negligence isn't a question in strict  
17 liability at all, is it?

18 MR. HANCEY: No, it's not.

19 THE COURT: So one of the elements is missing.  
20 Negligence is missing.

21 MR. HANCEY: Yeah, negligence.

22 THE COURT: Okay. All you've got is a defective  
23 product, dangerous, commerce, consequence.

24 MR. HANCEY: Correct.

25 THE COURT: That's it. There's no negligence

1 involved in that at all.

2 MR. HANCEY: Correct.

3 THE COURT: Okay.

4 MR. HANCEY: The negligence claim would be similar.  
5 It would be duty to manufacture a safe product.

6 THE COURT: But that's implied right there. It's  
7 the bad product.

8 MR. HANCEY: Right.

9 THE COURT: As a result of the bad product.

10 MR. HANCEY: Which is the breach, and the causation  
11 are the experts and the damages are the experts.

12 THE COURT: Tell me how you can have those two  
13 concurrently. Judge, strict liability. Say, okay. Lesser  
14 evidence. I don't have to show that anybody was negligent.  
15 Okay.

16 MR. HANCEY: Well, we'll talk -- and then we'll  
17 talk one more time about the negligence claim. The express  
18 warranty claim has to do with the promotional literature.

19 THE COURT: Well, I can understand that. I can  
20 understand that. Good stuff.

21 MR. HANCEY: Yeah. It's good stuff. And the  
22 contract on the other side of it. But I'm happy to, Your  
23 Honor, talk with my co-counsel one more time about the  
24 negligence claim and see if we can --

25 THE COURT: I'm just talking back and forth here.

1           MR. HANCEY: I mean, you know, we whittled down the  
2           implied warranty claim. Those are out. We've gotten rid of  
3           the failure to warn claim, and we tried to just hone in on  
4           what we felt were our strongest claims. And we realize  
5           there's some overlap.

6           THE COURT: My inquiry is, hey, if you don't need  
7           the element, why bother with it?

8           MR. HANCEY: Right.

9           THE COURT: But that's just an inquiry.

10          MR. HANCEY: I understand, Your Honor. It's a good  
11          point.

12          THE COURT: Now, your warranty claim, your express  
13          warranty claim.

14          MR. HANCEY: Yes.

15          THE COURT: Now, are you talking there about both  
16          parties?

17          MR. HANCEY: Yes.

18          THE COURT: And tell me how and why and what.

19          MR. HANCEY: The claim against National is that  
20          National is the seller. Jonssons were the buyer. The seller  
21          made representations about the product, and those  
22          representations turned out to not be true and caused damages  
23          to the plaintiffs.

24          THE COURT: Okay. Are those damages the same  
25          damages as your strict liability damages?

1 MR. HANCEY: They're all the same damages.

2 THE COURT: So you can't, you can't double damages.

3 MR. HANCEY: No. No. And we're not trying to  
4 double dip.

5 THE COURT: You can't be paid twice.

6 MR. HANCEY: No. No. We're asking for one set of  
7 damages on any or all of the claims.

8 THE COURT: Now, when you're dealing with an  
9 express warranty, is that a contract claim?

10 MR. HANCEY: Well, it's a good question. I mean, I  
11 think that it's implied in the claim that there was a  
12 contractual relationship because there was a purchase or there  
13 was some kind of a transaction. I don't know if it's a quasi  
14 contract claim, you know, to be more specific. But it  
15 certainly sounds in contract because it talks about  
16 representations being made and breached. So, you know, and  
17 relied on and so forth.

18 THE COURT: Now, in dealing with contract damages,  
19 are you talking about the same kind or the same quantum from  
20 the strict liability damages?

21 MR. HANCEY: Yes, Your Honor. I don't think  
22 there's any difference in the damages amongst the different  
23 claims.

24 THE COURT: No. No. We missed each other on that.

25 MR. HANCEY: Okay.



1 THE COURT: Are contract claims different than  
2 strict liability claims?

3 MR. HANCEY: Yes, they are.

4 THE COURT: Okay. Are damages different on strict  
5 liability claims and contract claims?

6 MR. HANCEY: They can be, yes.

7 THE COURT: Are they different here?

8 MR. HANCEY: I don't think the dollar amount is any  
9 different. The damages that the Jonssons sustained are what  
10 they are. And I guess there's two different paths of getting  
11 there.

12 THE COURT: Sure.

13 MR. HANCEY: Yeah.

14 THE COURT: You say, well, I'm justified in saying  
15 you owe me money, folks, because you breached your warranty.  
16 Okay. Or you say, I want to have you pay me money, folks,  
17 because you gave me a bad product --

18 MR. HANCEY: Yes.

19 THE COURT: -- that hurt my inventory.

20 MR. HANCEY: That's correct. Yeah. It's two  
21 different ways of getting to the same result, the same  
22 damages.

23 THE COURT: Okay. Now, do you point to any  
24 specific legal proposition on your warranty?

25 MR. HANCEY: Well, the legal proposition is sort of

1 set out in the jury instruction --

2 THE COURT: No. No. I'm asking you for your  
3 specific legal proposition. Say, Judge, here's my legal  
4 proposition, and I trace that back either to a statutory  
5 footing or to a case footing or common law, you know.

6 MR. HANCEY: Well, the express warranty law that  
7 I'm familiar with is in the UCC.

8 THE COURT: Okay. And it has some interesting  
9 deviations and limitations.

10 MR. HANCEY: It does. And some of the foundational  
11 things include whether a party was a seller, whether a party  
12 was a merchant, although that's more with respect to implied  
13 warranties.

14 THE COURT: Okay. Well, you think about those.

15 MR. HANCEY: Yeah.

16 THE COURT: Okay. What specific express warranty  
17 do you point to as the basis for your saying they were  
18 breached?

19 MR. HANCEY: In Exhibit 12 with respect to  
20 National, the representations that the lactation crumlets  
21 would reduce kit losses, improve lactation for better size,  
22 include kit growth and minimize female losses. As to Rangen,  
23 that would be Exhibit 10.

24 THE COURT: If you don't recover on strict  
25 liability where are you? Do you have a breach?

1           MR. HANCEY: I'm trying to think that through. I  
2       guess it would depend on the reason for there being no strict  
3       liability.

4           THE COURT: Well, you think about that.

5           Okay. Well, let me hear from the defendants. Tell  
6       me, to begin with, why we should differentiate between either  
7       of the defendants. Why not joint and several?

8           MR. MITCHELL: One, because joint and several  
9       liability has been abolished in Utah, Your Honor.

10          THE COURT: I'm sorry?

11          MR. MITCHELL: Joint and several liability has been  
12       abolished in Utah, Your Honor.

13          THE COURT: Well, as a practical matter. But why  
14       aren't you stuck, period, together? Why should we apportion  
15       it?

16          MR. MITCHELL: I would -- because, well, I guess I  
17       don't follow. If you don't -- if you don't have joint and  
18       several liability, if that's not a viable --

19          THE COURT: No. You produce the product together.

20          MR. MITCHELL: Sure.

21          THE COURT: On the strict liability question you  
22       fly in the same boat.

23          MR. MITCHELL: Well, as it -- vis-à-vis the  
24       plaintiffs, I would say that I tend to agree. Vis-à-vis each  
25       other, I would say --

1           THE COURT: Nobody's sued each other. Nobody has  
2 an action over --

3           MR. MITCHELL: Sure. But it would be I think --  
4 and it may end up being a moot point. I suspect it will end  
5 up being a moot point at some point. But in the event it  
6 doesn't, it would be frankly significantly more efficient and  
7 helpful to the defendants for the jury to provide an  
8 apportionment.

9           THE COURT: Well, it depends. If you both produced  
10 the defective product and the defective product caused damage,  
11 why should we apportion at all?

12          MR. MITCHELL: Because we each had different roles  
13 in producing that product, and it would depend upon the reason  
14 for that deficiency.

15          THE COURT: You have to jointly produce the  
16 product.

17          MR. MITCHELL: But we acted -- we acted together.

18          THE COURT: Why don't you sue each other and get  
19 that determined amongst yourselves?

20          MR. MITCHELL: You know, I don't know. We are  
21 where we are right now. And it would -- given all of the  
22 information that the jury has heard, it would seem appropriate  
23 for them to provide that apportionment, if necessary.

24          THE COURT: Well, I'm interested in why we should  
25 distinguish one from the other of the defendants if both

1 participated in producing the product.

2 MR. MITCHELL: Because each defendant's  
3 participation was different from the others. And if one  
4 entity's participation has greater fault or greater cause  
5 associated with producing a defective product, that ought to  
6 properly be allocated to that particular defendant.

7 THE COURT: But you both participated in producing  
8 the product.

9 MR. MITCHELL: Correct.

10 THE COURT: Indeed not just the product, but  
11 participating in putting it into the stream of commerce.

12 MR. MITCHELL: Correct.

13 THE COURT: And accommodated people in saying who  
14 ought to be billed.

15 MR. MITCHELL: I'm sorry? I didn't follow that  
16 last one.

17 THE COURT: Yeah. Different billing to different  
18 recipient of product.

19 MR. MITCHELL: Rangen billed one entity, and that  
20 was National. Rangen didn't bill any other entity.

21 THE COURT: Oh, but National did.

22 MR. MITCHELL: Sure. It's National's customers.

23 THE COURT: Sure.

24 Okay. What else do you see here?

25 MR. MITCHELL: From Rangen's perspective, Your

1 Honor, there are a couple of instructions that we have issue  
2 with. The first one is Number 33, violation of a safety law.  
3 And this is -- I provided the Court with a memorandum.

4 THE COURT: Violation of what now?

5 MR. MITCHELL: Violation of a safety law as a basis  
6 for a claim of negligence. And I provided the Court with a  
7 memorandum. And there are two points with regard to Rangen  
8 that would preclude giving the instructions that plaintiffs  
9 have requested. First one, this statute comes from Utah Code  
10 Section 4-12-8. And the very first sentence of that statute  
11 provides that, no person in this state shall, and then a  
12 laundry list of things that are prohibited. And what has been  
13 established in this case is that Rangen did nothing within the  
14 state of Utah.

15 THE COURT: Oh, they just happen to bill the  
16 product and addressed it somebody --

17 MR. MITCHELL: Nope. Wrong.

18 THE COURT: -- recognizing that it was going to be  
19 part of that great commerce that the Supreme Court likes to  
20 talk about.

21 MR. MITCHELL: I respectfully disagree with Your  
22 Honor. Rangen manufactured the feed in the state of Idaho.  
23 Rangen delivered the feed in the state of Idaho. The feed was  
24 picked up by a third party and taken from the state of Idaho  
25 into Utah. Rangen did not bill anybody in the state of Utah.

1 Rangen did nothing in the state of Utah. Rangen did nothing  
2 to violate the Utah Code 4-12-8.

3 THE COURT: I guess Rangen is not engaged in  
4 interstate commerce at all. Doesn't sell out of state at all.

5 MR. MITCHELL: We're not talking about whether  
6 Rangen sells out of state or not. We're talking about whether  
7 Rangen performed any act in this case within the state of  
8 Utah. And the only evidence is that Rangen's activities were  
9 limited to the state of Idaho in this case. Rangen did  
10 nothing in the state of Utah in this case.

11 THE COURT: Okay. And what's your next one?

12 MR. MITCHELL: The other issue with this particular  
13 instruction, Your Honor, is the manner in which it is being  
14 proposed as a negligence per se instruction. And the  
15 authorities that we provided for within our memorandum make it  
16 clear that the nature of this statute is not such that it  
17 would provide a basis for a claim in negligence per se.

18 THE COURT: Well, I asked counsel for his legal  
19 proposition. Which do you point to?

20 MR. MITCHELL: We point to, Your Honor -- there  
21 were a number of cases cited on Page 3 of our memorandum  
22 beginning with Child vs. Gonda at 972 P2d 425. Gaw, G-A-W,  
23 vs. State of Utah, 798 P2d 1130. And in those cases what we  
24 find, Your Honor, is that in order for a statute to provide a  
25 basis for a claim in negligence per se as this instruction is

1 drafted, the statute must provide for a bright line standard.

2 So, for example, did the person drive above 55 or  
3 not? If you're 56, you have violated a statute, and if that  
4 caused damage then you are to pay. Where, however, we're  
5 talking about the reasonableness or some judgment that must be  
6 made about determining whether somebody, in fact, violated a  
7 statute, that statute, the nature of it does not provide a  
8 basis for a claim in negligence per se. And that is the  
9 fashion in which this instruction has been drafted.

10 THE COURT: Okay. Well, I'll look at it. And that  
11 number is which one again?

12 MR. MITCHELL: 33, Your Honor.

13 THE COURT: Okay. I thought they wanted to go  
14 beyond negligence per se because they already had strict  
15 liability. There's got to be something beyond that. But  
16 okay.

17 MR. MITCHELL: At least with regard to Rangen, Your  
18 Honor, what -- we do have issues with the instructions with  
19 regard to a claim for express warranty. If you look at the  
20 operative complaint in this matter, no claim for express  
21 warranty has been pled. It's not at issue in the case, and it  
22 has not been pled, so no instructions should properly be given  
23 on those counts.

24 THE COURT: Anything in the pretrial order?

25 MR. MITCHELL: The plaintiffs identified a theory



1 of breach of express warranty. Never moved on it in the  
2 complaint.

3 THE COURT: Pretrial order was initially stipulated  
4 to and submitted.

5 Okay. Well, they do suggest that the flyer that  
6 they look to from Seattle said some nice things about the  
7 product.

8 MR. MITCHELL: Rangen had nothing to do with the  
9 flyer.

10 THE COURT: Oh.

11 MR. MITCHELL: And I don't believe the plaintiffs  
12 are relying upon the flyer as a basis for their express  
13 warranty claim against Rangen.

14 THE COURT: I asked them for their proposition.  
15 Okay.

16 MR. MITCHELL: I believe, Your Honor, those are the  
17 primary issues of contention for us with the exception of -- I  
18 believe those are the primary issues of contention, and then  
19 obviously we'll have to take up some of the issues depending  
20 upon how you rule upon the motions for directed verdict and  
21 revisit those.

22 THE COURT: Okay. Anything else?

23 MR. MINNOCK: In addition to the ones that  
24 Mr. Mitchell identified, if you look at Exhibit 49, the  
25 plaintiffs have asked to add an exception on that as to,

1 quote, whether or not the buyer relies on the description in  
2 entering into the transaction.

3 I mention this because you talk about the flyer.  
4 The flyer was not something that the plaintiffs have testified  
5 that they ever saw before purchasing the product. The only  
6 information that they ever received came from Ken Griffeth.  
7 The flyer was actually given to Mr. Griffeth. And so what  
8 these plaintiffs are attempting to do is to say, we did not  
9 see the express warranty, but we should be allowed to rely  
10 upon it. And --

11 THE COURT: You warrant the world, don't you?

12 MR. MINNOCK: Well --

13 THE COURT: You said that, we have a nice product  
14 here. It will do this and this and this.

15 MR. MINNOCK: Well, I think that that's what the  
16 Court has to decide, because the instruction says, an express  
17 warranty is also created if the seller provides a description  
18 of the product that is made part of the basis for the sale.

19 Well, here it wasn't part of the basis of the sale.

20 THE COURT: What number is that?

21 MR. MINNOCK: It's 49.

22 THE COURT: Okay. I'll look at that.

23 MR. MINNOCK: All right. Thank you.

24 THE COURT: Anything else we need to worry about?

25 MR. MITCHELL: I think those were the -- I think

1       those were the primary issues, Judge.

2               THE COURT:   You had a question concerning the  
3       disclaimer tag today or yesterday.

4               MR. HANCEY:   Well, Your Honor, yeah.   We're asking  
5       the Court to exclude any jury instructions on that issue and  
6       to prohibit argument on that point.   There was no evidence  
7       that the language in the label ever became part of the  
8       bargain, that it was ever agreed to or acknowledged by the  
9       Jonssons.   In fact, the undisputed testimony is that he didn't  
10      read the tag.   It certainly wasn't negotiated for at the time  
11      of the sale.   So I think the Court -- I thought the Court had  
12      already ruled on that.   But in any event, we're asking the  
13      Court if not, to remove that from the instructions.   And, in  
14      fact, I think we agreed to that in the conference room that  
15      the point not be argued.   It's going to confuse the jury when  
16      there was no evidence on that point.

17              THE COURT:   Is that your agreement?

18              MR. MINNOCK:   No.   No.   No.   No.   No.   The express  
19      warranty is in evidence as Exhibit Number 9.   I asked  
20      Mr. Jonsson about it.   He said that he did not read the entire  
21      document but that he did, in fact, see it.   And if you look at  
22      the UCC, our position is is that as long as the jury  
23      instruction indicates that has been proposed, that's  
24      stipulated to, that if it's conspicuous it wipes out the  
25      express warranties.   Now, you expressed some concern --

1           THE COURT: You mean given with the right hand and  
2 taken away with the left hand?

3           MR. MINNOCK: And I understand that's your concern.  
4 But here again, here's what we're doing now. We're saying  
5 that, I can't rely on a document that the plaintiffs did see,  
6 but the plaintiffs can rely upon the document that they didn't  
7 see. In other words, the only document that they saw before  
8 they opened these bags said there were no express warranties  
9 at all. And now what we're saying is, well, because there was  
10 a warranty given to somebody else that can be construed as a  
11 warranty that the Jonssons never saw that that overcomes the  
12 exclusion of the warranty that they did see or could have  
13 seen. So that's the issue we would ask you to look at.

14          THE COURT: It's really a public policy issue. Can  
15 you tell somebody one thing and take it away with another?

16          MR. MINNOCK: Well --

17          THE COURT: You know, if you're going to be honest  
18 in your salesmanship, it seems to me that you have to be  
19 consistent. If you're going to say, hey, folks, great  
20 product. Great product. And then you say, but we didn't  
21 really mean it. We really didn't mean it. That's very  
22 strange.

23          MR. MINNOCK: Well, if you look --

24          THE COURT: I'd like to see some legal authority  
25 that suggests that you can you giveth with the right hand and

1 take it away with the left. And I'm happy to be educated in  
2 that area.

3 MR. MINNOCK: Well, the reason that the limited  
4 warranty says what the limited warranty says is exactly what  
5 it says on the label, which is: Individual results from the  
6 use of these product may vary due to management, environmental  
7 or sanitation differences, and then it goes on. And then it  
8 says: National warrants that this feed will meet the  
9 guaranteed analysis set forth on the label. And there is no  
10 question it did not. It clearly met the terms of what the  
11 express warranty on the label was.

12 And our position is that's the reason that every  
13 product comes with a limited warranty.

14 THE COURT: You mean with extra nitrites, you're  
15 not, you're not vulnerable --

16 MR. MINNOCK: No.

17 THE COURT: -- because of the so-called limited  
18 warranty?

19 MR. MINNOCK: No. I'm suggesting to you that the  
20 limitation on the express warranty is enforceable against the  
21 warranty claim. If there's a strict liability or negligence  
22 claim they can bring it.

23 THE COURT: Let's look at the language there. Why  
24 don't you read the language again.

25 MR. MINNOCK: Individual results from the use of

1 this product may vary due to management, environmental and  
2 sanitation differences.

3 THE COURT: Yeah.

4 MR. MINNOCK: And then it goes on: National Feeds  
5 warrants that this feed contained herein meets the guaranteed  
6 analysis as set forth above on this label. There are no other  
7 warranties or merchantability or fitness --

8 THE COURT: And where did we find nitrites on that?

9 MR. MINNOCK: Well, of course nitrites aren't on  
10 this.

11 THE COURT: Sure, they're not. Sure, they're not.

12 MR. MINNOCK: Right. And if there are, then  
13 they've got a strict liability claim. In other words, if we  
14 made a warranty to them, hey, there's no nitrites in this  
15 stuff, then they've got a warranty claim.

16 THE COURT: If they have a limited warranty, it  
17 contains only A, B and C, but it happens to contain D. Well,  
18 okay.

19 MR. MINNOCK: The warranty simply says it meets the  
20 guaranteed analysis. That's the only warranty.

21 THE COURT: It says what it says.

22 MR. MINNOCK: It says what it says.

23 THE COURT: But it doesn't say D.

24 MR. MINNOCK: It doesn't say D. It doesn't say  
25 nitrites. I'll admit that.

1           MR. HANCEY: Do I need to respond to that, Your  
2 Honor?

3           THE COURT: Sure.

4           MR. HANCEY: Here's the law as I understand it.  
5 First of all, they make an express warranty to the world.  
6 They're putting it out there, anybody who reads it, anybody  
7 who doesn't read it, they're guaranteeing the product is going  
8 to be a certain way. And that's for the benefit of anybody  
9 who buys it.

10           On the other hand, and then what has to happen is  
11 we look at the actual time of contract when they purchase the  
12 feed and it was shipped to them. So an order was placed, an  
13 order was received. That was the time of the contract.  
14 There's no evidence that limitation of liability was discussed  
15 or any kind of a disclaimer of warranty was discussed. That's  
16 the undisputed testimony.

17           So what they're doing is they're adding terms to a  
18 sale after the sale is consummated. And the UCC expressly  
19 addresses that issue. And it says, if you're dealing with a  
20 merchant on a one hand and a nonmerchant in those particular  
21 goods on the other hand, you don't get to add terms in after  
22 the fact unless they're expressly assented to there's no  
23 evidence of expressed assent. There's no evidence that  
24 Jonsson said, you know what, we agreed to use these crumlets  
25 at our own risk. If all of our mink die that's going to be

1     our problem, and we're limited to the price of feed. They  
2     didn't agree to that. In fact, Keith Jonsson testified  
3     undisputed, we got the crumlets. I looked at the label. I  
4     saw the protein amount, and I fed it to my mink. And that's  
5     all he looked at.

6             So that's what the law says on warranties. Like  
7     the Court has said, you don't get to give with one hand and  
8     take it away over here. They made the promises they made, and  
9     the Jonssons used the product and the mink were hurt.

10            THE COURT: Counsel suggests that there are no  
11     warranties from Rangen. How do you respond to that?

12            MR. HANCEY: I respond to that like this.  
13     Exhibit 10 is the fur production agreement, the contract  
14     between National and Rangen. In that document Rangen makes a  
15     very critical expressed promise to National. And the promise  
16     is, the feed that we manufacture for you, National Feed, will  
17     not be adulterated.

18            And Mr. Buschur agreed on the stand. If, in fact,  
19     Rangen produced material that was adulterated, then they  
20     violated their contractual guarantee to National Feeds. As a  
21     third-party beneficiary, as an end user under the UCC and here  
22     in Utah, the Jonssons are entitled to rely on and benefit from  
23     any guarantees that the Rangen people made to the National  
24     Feeds people in that contract.

25            THE COURT: And give me your statutory provision



1 for that.

2 MR. HANCEY: I should know it off the top of my  
3 head, but I have it right here.

4 Utah Code 70A-2-315.

5 THE COURT: Do you really want to go ahead on  
6 negligence?

7 MR. HANCEY: Your Honor, here's what we've decided  
8 to do if the Court will allow us to. We want to go back to  
9 the office, and we want to do a little bit of research. If we  
10 come back on Tuesday morning satisfied that we can get away  
11 with one and without the other, we'll go ahead and do that.  
12 But we just want to do a little bit of research on that issue  
13 before we concede one of those claims.

14 THE COURT: Yeah. One of my practical problems is  
15 that I need to get my instructions finished --

16 MR. HANCEY: I understand.

17 THE COURT: -- hopefully if not over the weekend by  
18 the time you fellows and gals arrive here Tuesday morning.

19 MR. HANCEY: Would it be helpful if we e-mailed the  
20 Court sometime during this weekend if we could just have a day  
21 or two to look into the issue? I'm happy to do it before  
22 Tuesday, if that's what we're talking about.

23 THE COURT: Well, how about if I give you an  
24 opportunity to go back to the office this afternoon and have  
25 you do the best you can and tell me whether you're going to

1 move ahead on that claim or whether you're not?

2 MR. HANCEY: At the end of today?

3 THE COURT: It's as good a time as any.

4 MR. MINNOCK: Okay. And what's the best way to  
5 communicate that to the Court?

6 THE COURT: Our court e-mail number, which  
7 Stephanie or Ashley or my secretary can give to you.

8 MR. HANCEY: Okay. We'll do that, Your Honor.

9 THE COURT: I think that's an interesting question  
10 because in the preparation of instructions, if that is not  
11 there as really kind of a redundant thing, it's a lot easier  
12 and a lot more simpler --

13 MR. HANCEY: I understand, yes.

14 THE COURT: -- to deal with the substantive  
15 questions that we've got. Bad stuff, feed, consequence.

16 MR. HANCEY: We'll have an answer by the end of the  
17 day.

18 THE COURT: Copies to them.

19 MR. HANCEY: Of course, yes.

20 THE COURT: Well, I'll note the ones that you've  
21 withdrawn, and I'll consider the others as requested, and  
22 we'll do the best we can with what we've got. Why don't we  
23 plan on getting together to examine whatever package we come  
24 up with, if you'll do that by 11:00 on Tuesday. We'll have an  
25 instruction conference at that time. I hope to be able to

1 give you a package that you'll have an opportunity to examine  
2 and agree with or disagree with and suggest improvements or  
3 deletions or additions.

4 MR. MITCHELL: Your Honor, would it be feasible if  
5 the Court were to get its packet over the weekend to have  
6 those e-mailed around to counsel so we can take a look at  
7 them?

8 THE COURT: I'll give them to you at 11 o'clock on  
9 Tuesday, which is the target time I've got for me --

10 MR. MITCHELL: Okay.

11 THE COURT: -- with everything else I have to do.

12 MR. MITCHELL: Understood.

13 THE COURT: But you'll have adequate time to look.

14 MR. MITCHELL: Okay.

15 MR. MINNOCK: Could you answer a question that's  
16 plagued us for the last week and we haven't been able to  
17 figure out? Are you planning on instructing the jury before  
18 we do closings, or do we do closings and then you instruct the  
19 jury?

20 THE COURT: Yes. You do closings, and then I  
21 instruct. I have the last word.

22 MR. MINNOCK: Thank you.

23 MR. MERCER: Would it be helpful to talk about the  
24 schedule, then, beginning at 1 o'clock?

25 MR. HANCEY: 11 o'clock.

1 MR. MERCER: I mean, when the jury comes.

2 THE COURT: I'm interested in your best guess as to  
3 time.

4 MR. HANCEY: Well, are we going to do -- are we  
5 going to divide the opening arguments between parties or  
6 between sides? Because I would like to save some for  
7 rebuttal.

8 THE COURT: Well, yeah. You're entitled to save  
9 something for rebuttal.

10 MR. HANCEY: Right.

11 THE COURT: And we really ought to divide it  
12 between sides. We've let people run on here thinking that we  
13 may have two parties defendants that aren't necessarily in the  
14 same tub. But I think we ought to recognize that there may be  
15 a little slippage, but generally between sides. We'll let you  
16 talk, we'll let each of them talk briefly and then we'll let  
17 you talk.

18 MR. HANCEY: Okay. Very good.

19 MR. MERCER: Should we talk about how long?

20 MR. HANCEY: I don't know. 30 minutes?

21 THE COURT: Okay.

22 MR. MINNOCK: I would say closer to 45. I mean,  
23 we're going to have to divide.

24 MR. HANCEY: Fair enough. Okay. 45 minutes. I'm  
25 okay with that.

1                   MR. MERCER: 45 minutes per side, and we can go 30  
2 and then 15.

3                   THE COURT: However you want to divide it  
4 appropriately. I'm fairly flexible, as long as we are talking  
5 about the case.

6                   We'll see you at 11:00 on Tuesday.

7                   MR. HANCEY: Thank you, Judge.

8                   MR. MERCER: Thank you.

9                   MR. MITCHELL: Thank you.

10                  THE COURT: Thanks a lot.

11                  (Whereupon, the court proceedings were concluded.)

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1 STATE OF UTAH )

2 ) ss.

3 COUNTY OF SALT LAKE )

4 I, KELLY BROWN HICKEN, do hereby certify that I am  
5 a certified court reporter for the State of Utah;

6 That as such reporter, I attended the hearing of  
7 the foregoing matter on January 17, 2014, and thereat reported  
8 in Stenotype all of the testimony and proceedings had, and  
9 caused said notes to be transcribed into typewriting; and the  
10 foregoing pages number from 797 through 897 constitute a full,  
11 true and correct report of the same.

12 That I am not of kin to any of the parties and have  
13 no interest in the outcome of the matter;

14 And hereby set my hand and seal, this \_\_\_\_ day of  
15 \_\_\_\_\_ 2007.

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KELLY BROWN HICKEN, CSR, RPR, RMR  
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